FILED
OCT 18 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-657

ISABEL KIMBLE, BRUCE BLACKADAR, MARY FRAZZINI, THEODORE OLESON, JR., MARJORIE DA COSTA EASTMAN
Appellants,

v.

WILLIAM D. SWACKHAMER,
Secretary of State of the State of Nevada,

and

LEGISLATIVE COMMISSION OF THE STATE OF NEVADA,
Intervenor,
Appellees.

On Appeal From the Supreme Court of Nevada

JURISDICTIONAL STATEMENT

SOLAMAN G. LIPPMAN, ESQ.
MARC A. STEFAN, ESQ.
THOMAS J. HART, ESQ.
LIPPMAN & HART
1801 K Street, N.W.
Suite 220
Washington, D.C. 20006
(202) 467-6520

Of Counsel:

PHYLLIS HALSEY ATKINS, ESQ.
777 West Second Street
Suite 200
Reno, Nevada 89503

October 18, 1978

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

Page

OPINIONS BELOW 2

JURISDICTION 2

QUESTION PRESENTED 3

CONSTITUTIONAL PROVISIONS AND STATUTES 3

RAISING THE FEDERAL QUESTION 8

STATEMENT OF THE CASE 8

THE QUESTION IS SUBSTANTIAL 12

CONCLUSION 20

APPENDIX ..... 1a *et seq.*

CITATIONS

CASES:

Barlotti v. Lyons, 182 Cal. 575, 189 P. 282 (1920) 14

Dyer v. Blair, 390 F. Supp. 1291 (N.D. Ill. 1975) 16

Gill v. Morris, 79 Okla. 89, 191 P. 364 (1920) 13

Hatch v. Murray, 165 Mont. 92, 526 P.2d 1369 (1974).. 14

Hawke v. Smith, 253 U.S. 221 (1920). 12,13, 14, 15, 16, 17, 19

Herbring v. Brown, 92 Ore. 176, 180 P. 328 (1919) 14

In Re Opinion Of The Justices, 188 Me. 544, 107 A. 673 (1919) *aff'd sub nom.* Hawke v. Smith, 253 U.S. 221 (1920) 13

Leser v. Garnett, 258 U.S. 130 (1922) 12, 13, 14, 15, 16, 17, 18, 19

National Prohibition Cases, 253 U.S. 350 (1920) 12, 16

Opinion Of The Justices Relative To The Eighteenth Amendment, 262 Mass. 603, 160 N.E. 439 (1928).. 13, 14, 16, 17

Page

Prior v. Noland, 68 Colo. 263, 188 P. 729 (1920) 13

State ex rel. Tate v. Sevier, 333 Mo. 622, 62 S.W. 895 (1933) 13, 14

Trombetta v. Florida, 353 F. Supp. 575 (M.D. Fla. 1973) 13, 15, 17, 18

Walker v. Dunn, 498 S.W. 2d 102 (Tenn. 1972) 13, 15, 17, 18

CONSTITUTIONAL PROVISIONS AND STATUTES:

Article V, United States Constitution ..... 3, *et passim*

Seventeenth Amendment, United States Constitution .. 19

Chapter 174, Nevada Statutes, 1977 ..... 3, *et passim*

H.J. Res. 208, 92d Cong., 2d Sess. (1972) 6, 8

H.J. Res. 638, 95th Cong., 2d Sess. (1978) 7, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

ISABEL KIMBLE, BRUCE BLACKADAR, MARY FRAZZINI, THEODORE OLESON, JR., MARJORIE DA COSTA EASTMAN
Appellants,

v.

WILLIAM D. SWACKHAMER,
Secretary of State of the State of Nevada,

and

LEGISLATIVE COMMISSION OF THE STATE OF NEVADA,
Intervenor,
Appellees.

On Appeal From the Supreme Court of Nevada

JURISDICTIONAL STATEMENT

Isabel Kimble, Bruce Blackadar, Mary Frazzini, Theodore Oleson, Jr., and Marjorie da Costa Eastman, Appellants, appeal from the final judgment of the Supreme Court of Nevada, dated September 19, 1978, holding, in a divided opinion, that Chapter 174 of the 1977 Statutes of Nevada—which statute directs the holding of an advisory referendum on the question of whether the legislature of Nevada should ratify the proposed Equal Rights Amendment—is not repugnant to Article V of the Constitution of the United States.

OPINIONS BELOW

The divided opinion of the Supreme Court of Nevada, dated September 19, 1978, which appears in the appendix hereto, p. 1a, *infra*, has not yet been reported.

The opinion of the First Judicial District Court of Nevada, dated January 31, 1978, which appears in the appendix hereto, p. 9a, *infra*, is not reported.

JURISDICTION

The judgment of the Supreme Court of Nevada, affirming the grant of summary judgment in favor of Appellees by the First Judicial District Court of Nevada, is a final judgment by the highest Court for the State of Nevada and was entered on September 19, 1978. See p. 1a, *infra*. On October 2, 1978, Appellants filed with the Supreme Court of Nevada a motion seeking an injunction against Appellee Swackhamer, Secretary of State of the State of Nevada, prohibiting him from placing the advisory question on the November 7, 1978, general election ballot pending Appellants' filing of a Jurisdictional Statement with this Court and the Court's resolution of this appeal. (See p. 12a, *infra*.) Appellants' Motion was denied by the Supreme Court of Nevada on October 13, 1978.

A notice of appeal to this Court was duly filed in the Supreme Court of Nevada on October 2, 1978. See p. 14a, *infra*.

This appeal is being docketed in this Court within 90 days from the entry of judgment by the Supreme Court of Nevada. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

QUESTION PRESENTED

Whether Chapter 174, Nev. Stat., 1977, which provides for an advisory referendum on the question of whether the Legislature of Nevada should ratify the proposed Equal Rights Amendment, is repugnant to Article V of the United States Constitution because it alters the mode of ratification of a proposed constitutional amendment by a) providing for citizen participation in the amendatory process through the State's electoral machinery, b) requiring the Nevada Legislature to defer action on ratification until it receives the advice and recommendation of the Nevada voters, and c) deferring any action on ratification by the Legislature until after the next regularly scheduled election of Nevada legislators.

CONSTITUTIONAL PROVISIONS AND STATUTES

Article V, Constitution of the United States:

> The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several states, shall call a Convention for proposing Amendments, which in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress: Provided, that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Chapter 174, Nevada Statutes, 1977:

CHAPTER 174

AN ACT relating to a proposed amendment to the United States Constitution; providing an advisory referendum on ratification of the equal rights amendment; and providing other matters properly relating thereto.

[Approved April 12, 1977]

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. At the general election on November 7, 1978, an advisory question shall be submitted to the registered voters of this state on the ratification of the proposed amendment to the Constitution of the United States, commonly known as the equal rights amendment.

SEC. 2. At the time and in the manner provided by law, the secretary of state shall transmit the question to the several county clerks, and the county clerks shall cause it to be published and posted as provided by law.

SEC. 3. The proclamation and notice to the voters given by the county clerks pursuant to law shall be in substantially the following form:

Notice is hereby given that at the general election on November 7, 1978, an advisory question will appear on the ballot relating to the ratification of the following proposed amendment to the United States Constitution:

1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

3. This amendment shall take effect two years after the date of ratification.

THE RESULT OF THE VOTING ON THIS QUESTION DOES NOT PLACE ANY LEGAL REQUIREMENT ON THE LEGISLATURE OR ANY OF ITS MEMBERS.

SEC. 4. The ballot page assemblies and the paper ballots to be used in voting on the advisory question shall present the question in substantially the following form:

Do you recommend that the Nevada legislature ratify the following proposed amendment to the United States Constitution, commonly known as the equal rights amendment?

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Sec. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Sec. 3. This amendment shall take effect two years after the date of ratification.

YES ..... NO .....

SEC. 5. The explanation of the question which shall appear on each paper ballot and sample ballot and in every publication and posting of notice of the question shall be in substantially the following form:

(Explanation of the Advisory Question)

Nevada has not yet ratified the "Equal Rights Amendment" to the United States Constitution. A "Yes" vote on this advisory

question would recommend that the Nevada legislature take action to ratify that amendment. A "No" vote on this advisory question would recommend that the Nevada legislature refrain from taking action to ratify that amendment.

THE RESULT OF THE VOTING ON THIS QUESTION DOES NOT PLACE ANY LEGAL REQUIREMENT ON THE LEGISLATURE OR ANY OF ITS MEMBERS.

SEC. 6. If a majority of the votes cast on the question is yes, the secretary of state shall certify the result to the president of the senate and the speaker of the assembly as the recommendation of the registered voters of the state, that the proposed amendment to the Constitution of the United States be ratified by Nevada. If a majority of the votes cast on the question is no, the secretary of state shall certify the result as the recommendation of the registered voters of the state, that the legislature should not ratify the amendment.

SEC. 7. All general election laws not inconsistent with this act are applicable.

SEC. 8. The question required by this act shall not be placed on any ballot, nor shall any other action which is required by this act be taken, if:

1. The Nevada legislature has ratified the proposed amendment on or before July 1, 1977; or

2. The legislatures of 38 other states have ratified the proposed amendment, and the United States Congress has accepted their ratification, on or before July 1, 1978.

H.J. Res. 208, 92d Cong., 2d Sess. (1972):

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States relative to equal rights for men and women.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE–

"SECTION 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

"SECTION 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

"SECTION 3. This amendment shall take effect two years after the date of ratification."

H.J. Res. 638, 95th Cong., 2d Sess. (1978):

JOINT RESOLUTION

Extending the deadline for the ratification of the equal rights amendment.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That notwithstanding any provision of House Joint Resolution 208 of the Ninety-second Con-

gress, second session, to the contrary, the article of amendment proposed to the States in such joint resolution shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States not later than June 30, 1982.

RAISING THE FEDERAL QUESTION

In their Complaint, filed with the First Judicial District Court of Nevada, and at each available opportunity thereafter, Appellants raised the claim that Chapter 174 of the 1977 Statutes of Nevada was repugnant to Article V of the Constitution of the United States. The First Judicial District Court of Nevada found that the Complaint was "for the purpose of challenging the constitutionality of Chapter 174, Statutes of Nevada 1977" and ruled that, since it is not binding upon the legislature, the referendum is not part of the ratification process and, therefore, is not contrary to Article V. On appeal of that decision, the Supreme Court of Nevada found: "At issue is the constitutionality of Chapter 174, 1977 Nev. Stats.". The Supreme Court of Nevada, in a divided opinion, ruled that, since the referendum is advisory in nature and not binding upon the Nevada legislators, Chapter 174 is not contrary to Article V.

STATEMENT OF THE CASE

The facts which are relevant to this appeal are not in dispute and may be fairly summarized as follows:

(1) On March 22, 1972, the Congress of the United States, by a two-thirds majority in each body, adopted H.J. Res. 208, 92d Cong., 2d Sess. (1972), which proposed to the several states the adoption of the Equal

Rights Amendment. 118 Cong. Rec. 9598 (March 22, 1972).

(2) Between March 22, 1972 and the filing of the Complaint in the instant action, thirty-five (35) states had ratified the proposed Equal Rights Amendment. Thirty-eight (38) state ratifications are necessary before the proposed Equal Rights Amendment can become a part of the Constitution of the United States. Currently, fifteen (15) states have not yet ratified the proposed amendment. These states are: Alabama; Arizona; Arkansas; Florida; Georgia; Illinois; Louisiana; Mississippi; Missouri; Nevada; North Carolina; South Carolina; Oklahoma; Utah; and Virginia.

(3) On October 5, 1978, the Congress of the United States extended the ratification period for the proposed Equal Rights Amendment from March 29, 1979 to June 30, 1982. H.J. Res. 638, 95th Cong. 2d Sess. (1978).

(4) On April 12, 1977, the Nevada legislature approved Assembly Bill No. 301 which is now known as Chapter 174 of the 1977 Statutes of Nevada. The Statute was signed by the Governor of Nevada. Chapter 174 is entitled:

> AN ACT relating to a proposed amendment to the United States Constitution; providing an advisory referendum on ratification of the equal rights amendment; and providing other matters properly related thereto.

(5) Chapter 174 provides that, on November 7, 1978, an advisory question on the issue of whether the proposed Equal Rights Amendment should be ratified by the Nevada legislature be presented to the registered

voters of the State of Nevada. Both Section 3 and Section 5 of Chapter 174 provide that:

> The result of the voting on this question does not place any legal requirement on the legislature or any of its members.

(6) Section 6 of the Chapter 174 provides that the Secretary of State of Nevada shall certify the result of the referendum to the President of the Senate of Nevada and the Speaker of the Assembly of Nevada.

(7) Section 8 of Chapter 174 provides that the advisory question will not be placed on the November 7, 1978 ballot if: (a) the Nevada legislature ratifies the proposed Equal Rights Amendment on or before July 1, 1977 or (b) the legislatures of 38 states ratify and such ratifications are accepted by the United States Congress on or before July 1, 1978. Neither contingency has occurred and the advisory question will be placed on the November 7, 1978 ballot.

(8) In the November 7, 1978 general election in Nevada, the entire General Assembly and one-half of the State Senate will be elected.

(9) On November 8, 1977, Appellants as taxpayers, citizens, and voters of the State of Nevada, filed a Complaint with the First Judicial District Court of the State of Nevada seeking a declaratory judgment that Chapter 174 violated Article V of the Constitution of the United States and further seeking to enjoin Appellee Swackhamer from causing the advisory question to be placed on the November 7, 1978 ballot. On January 31, 1978, upon consideration of the parties' cross motions for Summary Judgment, Plaintiffs' Motion for

Preliminary Injunction and oral argument, the First Judicial District Court granted Appellees' Motion for Summary Judgment holding that, since the vote on the advisory question is not binding, the referendum is not a part of the ratification process and thus does not violate Article V.

(10) Appellants appealed the decision of the First Judicial District Court to the Supreme Court of Nevada. Appellants reasserted their claim that Chapter 174 was an unconstitutional interference with the amendatory process set forth in Article V of the Constitution of the United States. On September 18, 1978, the Supreme Court of Nevada, in a divided opinion, affirmed the First Judicial District Court holding that Chapter 174 was not violative of Article V because it is advisory in nature and does not bind the legislators in their decision as to whether or not to ratify the proposed Equal Rights Amendment.

(11) On October 2, 1978, Appellants filed notice of appeal to this Court with the Supreme Court of Nevada. On the same day, Appellants filed a Motion with the Supreme Court of Nevada seeking an injunction against Appellee Swackhamer prohibiting him from placing the advisory question on the November 7, 1978 ballot pending Appellants' filing of a jurisdictional statement with this Court and this Court's resolution of the controversy over the constitutionality of Chapter 174. Appellants' Motion was denied by the Supreme Court of Nevada on October 13, 1978.

(12) Appellants are filing, under separate cover, a Motion for affirmative relief pending review with the appropriate Justice of this Court.

THE QUESTION IS SUBSTANTIAL

The issue presented by this appeal, whether a state statute providing for an advisory referendum on a proposed Constitutional amendment violates Article V of the United States Constitution because such statute impermissibly alters the mode of ratification, is a substantial question with profound and important implications. The precise issue has never been addressed by this Court.

Amendment of the United States Constitution is an exclusively Federal process which is controlled entirely by Article V of the United States Constitution. *Hawke* v. *Smith,* 253 U.S. 221 (1920); *National Prohibition Cases,* 253 U.S. 350 (1920). By their adoption of the United States Constitution, and specifically Article V, the several states and their citizens divested themselves of any right to participate in the amendatory process. As this Court stated in *Hawke* v. *Smith,* 253 U.S. 221, 230 (1920):

> . . . the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The act of ratification by the State derives its authority from the Federal Constitution to which the State and its people have alike assented.

Under Article V, the citizens of the several states have been totally excluded from participation in the amendatory process. *Hawke* v. *Smith,* 253 U.S. 221 (1920). Participation by the several states is limited to the vote of the legislatures (or conventions) on the text of amendments proposed by Congress (or a convention called by Congress). *Leser* v. *Garnett,* 258 U.S. 130 (1922). Ratification by the state legislatures, moreover, is not a legislative act. It is, instead, ". . . the expression of assent of the State to a proposed amendment," *Hawke* v. *Smith,* 253 U.S. at 229, and this "expression of assent", through ratification, "transcends any limitations sought to be imposed by the people of a State". *Leser* v. *Garnett,* 258 U.S. at 137.

Neither the citizens, through their state constitutions, nor the legislatures of the several states, through statute, can alter the mode of ratification of proposed amendments to the United States Constitution by injecting citizen participation into the amendatory process or otherwise placing conditions or limitations upon the legislature relative to ratification. *Hawke* v. *Smith,* 253 U.S. 221 (1920); *Leser* v. *Garnett,* 258 U.S. 130 (1922); *Opinion of the Justices Relative to the Eighteenth Amendment,* 262 Mass. 603, 160 N.E. 439 (1928); *Prior* v. *Noland,* 68 Colo. 263, 188 P. 729 (1920); *State ex rel. Tate* v. *Sevier,* 333 Mo. 622, 62 S.W. 895 (1933); *Walker* v. *Dunn,* 498 S.W. 2d 102 (Tenn. 1972); *Trombetta* v. *Florida,* 353 F. Supp. 575 (M.D. Fla. 1973).

In *Hawke* v. *Smith,* 253 U.S. 221 (1920), this Court ruled that it was unconstitutional, under Article V, for the State of Maine to subject the ratification of a proposed constitutional amendment by the Maine legislature to a popular referendum. Similarly, the Supreme Courts of a number of states which have considered the question have uniformly found it to be repugnant to Article V for a state to inject citizen participation into the amendatory process by means of a popular referendum. *Prior* v. *Noland,* 68 Colo. 263, 188 P. 729 (1920); *In re Opinion of the Justices,* 188 Me. 544, 107 A. 673 (1919) *aff'd sub. nom. Hawke* v. *Smith,* 253 U.S. 221 (1920); *Gill* v. *Morris,* 79 Okla. 89, 191 P. 364 (1920); *Hatch* v. *Murray,* 165 Mont. 92, 526 P.2d 1369 (1974); *Barlotti* v. *Lyons,* 182 Cal. 575,

189 P. 282 (1920); *Herbring* v. *Brown,* 92 Ore. 176, 180 P. 328 (1919); *State ex rel Tate* v. *Sevier,* 333 Mo. 622, 62 S.W. 2d 895 (1933).

The exclusion of citizen participation in the amendatory process which Article V requires has been found to be equally applicable where the referendum in question was advisory and not binding on the legislators. In *Opinion of the Justices Relative to the Eighteenth Amendment,* 262 Mass. 603, 160 N.E. 439 (1928), the Supreme Judicial Court of Massachusetts relied upon *Hawke* v. *Smith, supra.,* and *Leser* v. *Garnett, supra.,* and held that:

> The voters of the several states are excluded by the terms of Article 5 (sic) of the Constitution of the United States from participation in the process of its amendment. 160 N.E. at 440.

In an effort to circumvent the uniform court rulings that popular referenda on proposed constitutional amendments violate Article V, a number of states have sought to inject popular participation into the process by requiring a deferral of action relative to ratification until the voters of the states have had an opportunity to express their will through the election of legislators. Such efforts have also been uniformly declared violative of Article V. *Leser* v. *Garnett,* 258 U.S. 130 (1922); *Walker* v. *Dunn,* 498 S.W. 2d (Tenn. 1972); *Trombetta* v. *Florida,* 353 F. Supp. 575 (M.D. Fla. 1973).

In *Leser* v. *Garnett,* 258 U.S. 130 (1922), this Court ruled that it was unconstitutional, under Article V, for a state to require its legislature to defer action upon a proposed amendment until after the next regularly scheduled election. The Court found that such a deferral of action amounted to a limitation on the legislature. Relying upon *Hawke* v. *Smith,* 253 U.S. 221 (1920) the *Leser* Court reaffirmed the principle that the function of the legislature in ratifying proposed amendments "transcends any limitations sought to be imposed by the people of a State". *Leser* v. *Garnett,* 258 U.S. at 137. In *Walker* v. *Dunn,* 498 S.W. 2d 102 (Tenn. 1972) and *Trombetta* v. *Florida,* 353 F. Supp. 575 (M.D. Fla. 1973), the *Hawke* and *Leser* decisions were applied to strike down state constitutional provisions that prohibited the legislature from acting on a proposed amendment unless the legislature had been elected after proposal of the amendment.

Well reasoned decisions make it clear that the mode of ratification set forth in Article V is not subject to any modification by the states. This principle applies whether the modification is achieved directly by means of a popular referendum or by more indirect means such as the placing of limitations on a legislature by requiring deferral of action on ratification until the voters have the opportunity to express their opinions on the proposed amendment.

Chapter 174, Nev. Stat., 1977 is yet another transparent attempt by a state to achieve indirectly what the uniform judicial decisions prohibit being done directly, namely, to alter the mode of ratification.[1]

---

[1] In its decision, the Supreme Court of Nevada dismissed, without discussion, the one case most directly on point: *Opinion of the Justices Relative to the Eighteenth Amendment,* 262 Mass. 603, 160 N.E. 439 (1928). Rather, the Court below relied entirely upon *Dyer* v. *Blair,* 390 F. Supp. 1291 (N.D. Ill. 1975). The reliance on *Dyer* is misplaced. In *Dyer,* a three-judge court, per Stevens, J., ruled that the Illinois legislature could require a supermajority vote for ratification of a proposed constitutional amendment. In so

Chapter 174 seeks to achieve this change by declaring the referendum to be only advisory. Even if one were to concede that the referendum would not bind the votes of individual Nevada legislators,[2] the fact that the referendum is advisory is of no constitutional significance. In *Leser* v. *Garnett,* 258 U.S. 230 (1922), the deferral of ratification action until the next election in no way bound the legislators; yet, the deferral violated Article V. Neither were the legislators in any way bound in *Walker* v. *Dunn,* 498 S.W. 2d 102 (Tenn. 1972) and *Trombetta* v. *Florida,* 353 F. Supp. 575 (M.D. Fla. 1973), where the states of Tennessee and

---

ruling, the Court held that, since Article V did not specify the majority vote required for ratification, the *legislature* of a state *acting as the ratifying body pursuant to Article V* could adopt its own internal procedure as to the requisite majority, just as it could establish the quorum necessary. The *Dyer* Court found that substantial variations existed among the states as to the majority vote required for ratification and, further, that such variations had existed, without objection, since the initial adoption of the Constitution. Yet, the *Dyer* Court also ruled, citing *Hawke* v. *Smith,* 253 U.S. 221 (1920), *National Prohibition Cases,* 253 U.S. 350 (1920) and *Leser* v. *Garnett,* 258 U.S. 130 (1922), that a state, through legislation, or through its Constitution, could not impose a supermajority requirement or any other condition upon the legislature relative to ratification, including popular referenda, because such limitations would affect the mode of ratification. 390 F. Supp. at 1308. Plainly, Chapter 174 does not represent an internal procedure of the Nevada legislature of the type authorized by the *Dyer* Court. Nor is Chapter 174 a longstanding practice of Nevada or other states, as was the supermajority vote requirement for ratification. Instead, Chapter 174 represents an effort to provide for popular participation and limitations on the state legislature which have been condemned by every court which has addressed the issue, including the *Dyer* court.

[2] As the attached documents (pp. 15a-26a *infra.*) demonstrate, numerous Nevada legislators have declared that they intend to be bound by the referendum vote.

Florida prohibited action on ratification unless the acting legislature had been elected after the proposal of the amendment. Indeed, in the one reported case specifically involving an advisory referendum, the Supreme Judicial Court of Massachusetts ruled that the advisory nature of the referendum did not cure the constitutional infirmity. *Opinion of the Justices Relative to the Eighteenth Amendment,* 262 Mass. 603, 160 N.E. 439 (1928).

The constitutional infirmity of Chapter 174 is found in its alteration of the mode of ratification of a proposed constitutional amendment. It achieves this alteration in three ways. First, Chapter 174 resurrects the popular referendum in the amendatory process. The referendum is to be held as part of the general election with the results being reported directly to the State Senate and General Assembly. The vote of the Nevada citizens will, in its practical effect, supplant or, at least, drastically alter the deliberative process of the legislature required by Article V. On this ground alone, Chapter 174 runs afoul of this Court's decision in *Hawke* v. *Smith,* 253 U.S. 221 (1920) as well as the previously uniform decisions of the state Supreme Courts [3] prohibiting alteration of the mode of ratification through popular referenda.

Secondly, Chapter 174 requires the Nevada legislature to defer action on ratification until after it has received the advice and recommendation of the Nevada voters. Under the statutory scheme of Chapter 174, there are only two contingencies which would have

---

[3] The Supreme Court of Nevada is the *only* court which has ever authorized the participation of the general public in the ratification process.

absolved the legislature of the requirement to await the advice of the voters. These are a) that the Nevada legislature had ratified prior to July 1, 1977, or b) that thirty-eight states had ratified prior to July 1, 1978. Section 8, Chapter 174, Nev. Stat., 1977. Neither contingency occurred. Thus, unless Chapter 174 is to be viewed as a nullity, having no legal purpose, the Nevada legislature must defer its action on ratification until the voters have spoken. This requirement of deferral until the voters express their will is directly analogous to the limitations on the legislature found unconstitutional in *Leser* v. *Garnett,* 258 U.S. 230 (1922), *Walker* v. *Dunn,* 498 S.W. 2d 102 (Tenn. 1972) and *Trombetta* v. *Florida,* 353 F. Supp. 575 (M.D. Fla. 1973).

The third means by which Chapter 174 alters the mode of ratification is demonstrated by the fact that the entire General Assembly and one-half of the state Senate will be elected in the November 7, 1978 general election. As noted above, Chapter 174 requires deferral of action on ratification until after the general election. Therefore, the effect of Chapter 174 is to defer ratification action until after a new legislative body is elected at the next regularly scheduled election. This limitation on ratification is precisely the type of limitation declared repugnant to Article V by this Court in *Leser* v. *Garnett,* 258 U.S. 230 (1922) and by the courts in *Walker* v. *Dunn,* 498 S.W. 2d 102 (Tenn. 1972) and *Trombetta* v. *Florida,* 353 F. Supp. 575 (M.D. Fla. 1973).

The significance of the decision of the Supreme Court of Nevada goes to the very heart of the Article V ratification processes. It introduces an additional mode of ratification in which the popular will ex-

pressed in an advisory referendum will be persuasive if not decisive. It thus breaks down the uniformity of the ratification process required by Article V. Unless the decision of the Nevada Supreme Court is reversed, it will undermine *Hawke* v. *Smith* and *Leser* v. *Garnett, supra.,* as well as decisions of the state courts which have relied on these cases to strike down efforts to introduce popular electoral opinion into the ratification processes.

In its practical impact, the decision of the Nevada Supreme Court sets the stage in which the vote of the people will supplant the deliberative decision of the legislature. Only an amendment to Article V can properly achieve this result, as was the case with the Seventeenth Amendment to the United States Constitution which transferred the election of the United States Senators from the legislatures of the several states to popular elections within each state.

The Nevada decision will create confusion and disarray. It comes at a time when the Congress has extended the period in which the states may ratify the proposed Equal Rights Amendment and when Congress has submitted for ratification the proposed amendment granting full Congressional representation to the citizens of the District of Columbia. These pending proposed amendments emphasize that the national interest requires that the Supreme Court of the United States review the decision of the Nevada Supreme Court and render a definitive response.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted

SOLAMAN G. LIPPMAN, ESQ.
MARC A. STEFAN, ESQ.
THOMAS J. HART, ESQ.
LIPPMAN & HART
1801 K Street, N.W.
Suite 220
Washington, D.C. 20006
(202) 467-6520

Of Counsel:

PHYLLIS HALSEY ATKINS, ESQ.
777 West Second Street
Suite 200
Reno, Nevada 89503

October 18, 1978

APPENDIX

APPENDIX

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 10650

ISABEL KIMBLE, BRUCE BLACKADAR, MARY FRAZZINI, THEODORE OLESON, JR., and MARJORIE DA COSTA EASTMAN, *Appellants,*

vs.

WILLIAM D. SWACKHAMER, Secretary of State of the State of Nevada; and LEGISLATIVE COMMISSION OF NEVADA, Intervenor, *Respondents.*

Appeal from judgment; First Judicial District Court, Carson City; Michael E. Fondi, Judge.
Affirmed.

Phyllis Halsey Atkins, Reno,
for Appellants.

Robert List, Attorney General,
and Donald Klasic, Deputy,
Carson City,
for Respondent Secretary
of State.

Frank W. Daykin, Carson City,
for Respondent Legislative
Commission.

Opinion

(filed September 19, 1978)

By the Court, THOMPSON, J.:

At issue is the constitutionality of chapter 174, 1977 Nev. Stats., which requires the submission of an advisory question to the registered voters of this state on the ratification of the proposed amendment to the Constitution of

the United States commonly known as the equal rights amendment. It is asserted that the chapter violates article V of the federal constitution. The district court found no constitutional infirmity. For reasons hereafter expressed we agree with that court and, therefore, affirm the judgment entered below.

The advisory question to be presented at the 1978 general election is set out in section 4 of the chapter. It is:

> "Do you recommend that the Nevada legislature ratify the following proposed amendment to the United States Constitution, commonly known as the equal rights amendment?
>
> "Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> "Sec. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> "Sec. 3. This amendment shall take effect two years after the date of ratification.
>
> "YES..... NO....."

Section 3 and section 5 of the chapter each expressly state that "the result of the voting on this question does not place any legal requirement on the legislature or any of its members." Section 6 directs the secretary of state to certify the result of the votes cast on the question to the president of the senate and the speaker of the assembly as the recommendation of the registered voters of the state. Thus, the legislature may vote for or against ratification, or refrain from voting on ratification at all, without regard to the advisory vote.

Article V of the federal constitution divests the people of authority to themselves ratify amendments to the fed-

eral constitution. Such power is limited to two methods, by action of the legislatures of three fourths of the states, or conventions in a like number of states. Hawke v. Smith, 253 U.S. 221 (1920).[1]

The appellants contend that chapter 174, in practical effect, grants the registered voters of Nevada the authority to ratify the proposed equal rights amendment to the federal constitution since we may presume that the legislature will be governed by the outcome of the advisory vote if, perchance, it recommends ratification. However, the cases upon which they mainly rely in presenting this contention are not supportive. Those cases are Hawke v. Smith, supra, and Leser v. Garnett, 258 U.S. 130 (1922).

Hawke held that there could be no referendum upon the decision of a state legislature to ratify or reject a proposed amendment to the federal constitution. And Leser merely held that the function of a state legislature in ratifying a proposed amendment to the federal constitution was a federal function transcending any limitations sought to be imposed by the people of the state.[2]

---

[1] Article V.: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of it's equal Suffrage in the Senate."

[2] Other cases dealing with a binding referendum on prior legislative action ratifying a proposed amendment to the federal constitution are: Barlotti v. Lyons, 189 P. 282 (Cal. 1920); In re

Chapter 174 does not concern a binding referendum, nor does it impose a limitation upon the legislature. As already noted, the legislature may vote for or against ratification, or refrain from voting on ratification at all, without regard to the advisory vote. The recommendation of the voters is advisory only. In re Estate of Hogan, 146 N.W.2d 257, 259 (Iowa 1966). To recommend does not mean to bind. Fletcher v. Porter, 21 Cal.Rptr. 452, 454 (Cal. D.C.A. 1962). Consequently, we find it wholly impossible to construe chapter 174 as a limitation on legislative power violative of article V of the federal constitution.[3] Rather, the chapter simply specifies a means by which to assist the legislature whether to consent or not to consent to the proposed amendment. The following words of Dyer v. Blair, 390 F. Supp. 1291, 1307 (N.D.Ill. 1975), are apposite to the case at hand:

> "Article V identifies the body—either a legislature or a convention—which must ratify a proposed amendment. The act of ratification is an expression of consent to the amendment by that body. By what means that body shall decide to consent or not to consent is a matter for that body to determine for itself. This

---

Opinion of the Justices, 107 A. 673 (Me. 1919); Decher v. Vaughan, 177 N.W. 388 (Mich. 1920); Hatch v. Murray, 526 P.2d 1369 (Mont. 1974). In each instance, the court found a violation of article V of the federal constitution.

Limitations upon legislative power to ratify or refuse to ratify a proposed federal amendment likewise are in violation of article V. Trombetta v. State of Florida, 353 F.Supp. 575 (M.D.Fla. 1973); State ex rel. Tate v. Sevier, 62 S.W.2d 895 (Mo. 1933); Walker v. Dunn, 498 S.W.2d 102 (Tenn. 1972).

[3] One case, Opinion of the Justices, 160 N.W. 439 (Mass. 1928), may be read to support the proposition that a non-binding procedure is violative of article V. We reject that opinion as unsound, and not supported by the authorities relied upon by the Massachusetts court.

> conclusion is not inconsistent with the premise that the definition of the term "ratified" is a matter of federal law. The term merely requires that the decision to consent or not to consent to a proposed amendment be made by each legislature, or by each convention, in accordance with procedures which each such body shall prescribe." Affirmed.

/s/ THOMPSON, J.
Thompson

We concur:

/s/ BATJER, C.J.
Batjer

/s/ MANOUKIAN, J.
Manoukian

/s/ MOWBRAY, J.
Mowbray

GUNDERSON, J., *dissenting*:

I respectfully dissent.

I question whether the federal issue could, in any event, be considered correctly decided. Moreover, so far as I can perceive, my colleagues have not explained how it is proper under the Nevada Constitution for our Legislature—through an "Act" obviously intended neither to make nor to modify law, and therefore manifestly outside the Legislature's normal law-making function—to utilize this state's election ballots in ways not contemplated by Nevada's Constitution.

As the Legislative Counsel concedes, in Gibson v. Mason, 5 Nev. 283 (1869), this court declared the Legislature could not properly use the ballots to shift ultimate responsibility for enactment of a proposed law to the voters.[1] *A fortiori*, it would seem the Legislature, by Constitution solely a law-making body, may not pass a non-law requiring an "advisory" vote which binds neither the Legislature nor anyone else, and which defers to a future day decisions on how the vote may be used to shift or dilute legislative responsibiilty.

In Opinion of the Justices Relative to Eighteenth Amendment, 160 N.E. 439 (Mass. 1928), the Supreme Judicial Court of Massachusetts treated a question identical in principle to the one before us, i.e. whether an attempt through initiative petition to order an advisory question onto the State election ballots was proper under the Massachusetts Constitution. Deciding such a directive was an improper exercise of law-making power, the Massachusetts court noted its view that "[t]he precise question is whether it is a 'law' . . ." Holding in the negative, that respected court noted that "the word 'law' imports a general rule

[1] "An act of the legislature made dependent upon their votes or approval would be utterly void—and so it has been frequently held." *Id.* at 293.

of conduct," 160 N.E. at 440, which of course the "Act" of our Legislature, now under consideration, most certainly does not involve. The Court went on to note that the supposed law was

> . . . wanting in features essential to constitute its provisions a law within any permissible conception of the meaning of that word. Superficial appearances cannot clothe with the attributes of law something in substance vain and inoperative. The mandate to the secretary of the commonwealth in section 2 to tabulate the returns of the votes and to "transmit copies * * * to each Senator and Representative in Congress from this commonwealth" is subsidiary and incidental to the main purpose of the proposed law; it relates to a matter which standing alone possesses no legal force; it cannot convert into a law something in itself ineffectual.

160 N.E. at 440.

Ms. Atkins, counsel for the E.R.A. proponents, in effect contends this "advisory" referendum is not only unconstitutional on its face, but inherently unfair to historically disadvantaged and therefore relatively underfinanced persons, such as the proponents in this case arguably are. Ms. Atkins notes that rather than being able to concentrate their efforts merely on persuading the Nevada Legislature, as the U.S. Constitution would contemplate, E.R.A. proponents will now be forced to expend important financial resources attempting to win a totally non-binding victory in the November election—under penalty of having defeat used against them during the later, binding struggle in the Legislature.

Moreover, as Ms. Atkins points out, the E.R.A. proponents may well incur disadvantages from the "advisory" referendum—even if statewide vote totals show overall approval of the E.R.A. Election returns will be available

district by district. Hence, arguably some key legislators might be persuaded by the advisory vote to oppose the E.R.A., even if Ms. Atkins' clients succeed in generating general support for the amendment throughout Nevada.

Thus, Ms. Atkins argues in effect, by the improper use of the Nevada election process, the cost of the ratification process contemplated by the U.S. Constitution will be increased, its complexion will be changed, and uncontemplated complexities will be imposed. I agree.

/s/ GUNDERSON, J.
Gunderson

Case No. 38593 Department No. 2

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

ISABEL KIMBLE, et al., *Plaintiffs,*

vs.

WILLIAM D. SWACKHAMER, Secretary of State of the State of Nevada, *Defendant.*

LEGISLATIVE COMMISSION OF THE STATE OF NEVADA, *Intervenor.*

Findings of Fact, Conclusions of Law and Order

The parties to this action having filed cross motions for summary judgment, with the plaintiffs also filing a motion for preliminary injunction, and the parties having filed their points and authorities and an oral hearing being held thereon on January 30, 1978;

In consideration thereof, and for good cause appearing, this Court hereby makes the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. On November 8, 1977, the plaintiffs filed their complaint for declaratory judgment and preliminary injunction for the purpose of challenging the constitutionality of Chapter 174, Statutes of Nevada 1977.

2. The parties agree that plaintiffs are taxpayers and tax monies will be expended to implement Chapter 174.

3. On December 29, 1977, the defendant and intervener filed a joint motion for summary judgment and on January 13, 1978, the plaintiffs filed motions for summary judgment and preliminary injunction.

4. There are no material facts in dispute, and only issues of law remain to be decided.

Conclusions of Law

1. The plaintiffs, as taxpayers, have the standing to bring this action. Both sides present a justiciable controversy through their adverse interests, and the matter is ripe for adjudication. Therefore, an action for declaratory judgment is proper.

2. Chapter 174 is a "law" within the provisions of Article 4 of the Nevada Constitution. It meets all of the prerequisites of a law with respect to its drafting and approval by the Legislature and its endorsement by the Governor. As a law, it requires and directs certain acts to be performed by the election officers of the state for the purpose of placing an advisory question upon the ballot and to transmit the result of the vote to the Legislature.

3. Chapter 174 is not an initiative or referendum measure and, therefore, does not violate Article 19 of the Nevada Constitution.

4. The nonbinding nature of the advisory question does not make Chapter 174 invalid. All legislation, not expressly prohibited by either the state or federal constitution, may be enacted by the Legislature. Chapter 174 is within the legislative authority vested in the Legislature by Article 4, Section 1 of the Nevada Constitution, since there is nothing in the Nevada Constitution which prohibits the Legislature from placing a non-binding, advisory question on the ballot.

5. Since the vote on the advisory question provided for in Chapter 174 is non-binding and not controlling on the Legislature, and since the Legislature, therefore, is not required to follow the results of the vote on the question of whether the Equal Rights Amendment should be ratified

or not, Chapter 174 is not a part of the ratification process established in Article V of the United States Constitution and thus does not violate said Article V.

6. Plaintiffs are not entitled to either their motion for summary judgment or preliminary injunction.

7. Defendant and intervener are entitled to their motion for summary judgment.

Order

Therefore, in consideration of the foregoing Findings of Fact and Conclusions of Law, it is hereby ordered, adjudged and decreed that:

1. Plaintiff's motions for summary judgment and preliminary injunction are denied; and

2. Defendant and intervener's motion for summary judgment is granted.

Dated this 31st day of January, 1978.

/s/ Michael E. Fondi
Michael E. Fondi
District Judge

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 10650

ISABEL KIMBLE, BRUCE BLACKADAR, MARY FRAZZINI, THEODORE OLESON, JR., and MARJORIE da COSTA EASTMAN, *Appellants*,

vs.

WILLIAM D. SWACKHAMER, Secretary of State of the State of Nevada, and LEGISLATIVE COMMISSION OF THE STATE OF NEVADA, INTERVENOR, *Respondents*.

Motion for Order Restraining Respondents From Causing an Advisory Question Concerning the Equal Rights Amendment To Be Placed on Any Ballot Pending Appeal to the United States Supreme Court

(filed October 2, 1978)

Appellants Isabel Kimble, Bruce Blackadar, Mary Frazzini, Theodore Oleson, Jr., and Marjorie da Costa Eastman, by their attorney, respectfully move the Court for an order restraining Respondent William D. Swackhamer, Secretary of State of the State of Nevada from causing to be placed on the ballot of any general or special election an "advisory" question concerning ratification of the proposed Equal Rights Amendment (as provided in Chapter 174, 1977, Nevada Statutes) until the Supreme Court of the United States has ruled on Appellants' appeal in the above captioned matter. Appellants request that no undertaking or bond be required with respect to this motion. Appellants' grounds for this motion are in the attached Memorandum of Law.

The Court is respectfully urged to grant expedited consideration to this matter so that Appellants will not be prejudiced in their efforts to obtain review by the Supreme Court of the United States.

Respectfully submitted,

PHYLLIS HALSEY ATKINS
Attorney at Law
777 West Second Street
Reno, Nevada 89503

S. G. LIPPMAN
THOMAS J. HART
LIPPMAN AND HART
1801 K Street, N.W.
Suite 220
Washington, D.C. 20006

Attorneys for Appellants

By /s/ PHYLLIS HALSEY ATKINS
Phyllis Halsey Atkins

IN THE SUPREME COURT OF THE STATE OF NEVADA

(Caption Omitted in Printing)

Notice of Appeal to the Supreme Court of the United States

(filed October 2, 1978)

NOTICE IS HEREBY GIVEN that Isabel Kimble, Bruce Blackadar, Mary Frazzini, Theodore Oleson, Jr., and Marjorie da Costa Eastman, the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Nevada, affirming the granting of summary judgment for respondents above, entered in this action on September 19, 1978.

This appeal is made pursuant to 28 U.S.C. § 1257(2).

DATED this 2nd day of October, 1978.

PHYLLIS HALSEY ATKINS
Attorney at Law

By /s/ PHYLLIS HALSEY ATKINS
Phyllis Halsey Atkins
Attorney for Appellants
777 West Second Street
Reno, Nevada 89503

***Washington Post*, October 11, 1978, p. A-2, Col. 5**

TRADITION POSES OBSTACLE FOR THE PROPONENTS OF ERA INITIATIVE ON BALLOT

By Lou Cannon
Washington Post Staff Writer

RENO, Nev.—When Nevada voters go to the polls Nov. 7, they will be asked to repeal a long-ignored state constitutional provision prohibiting women and persons who have engaged in duels from holding public office.

Passage of the initiative is not in doubt. But its presence on the Nevada ballot is testimony to the obstacle of tradition that faces sponsors of the Equal Rights Amendment here as they try to win approval of another ballot provision favoring ERA.

The Church of Jesus Christ of Later-day Saints (Mormon) is adamantly opposed to the amendment, and its members constitute and estimated one-fifth of the state's voters. Excerpts from an address by Mormon official Roger Hunt of Las Vegas, widely circulated among members of the faith, claims that ERA will wipe out "protections" women now enjoy from divorce laws, as well as pregnancy leave, rights of privacy and exemptions from the military draft.

The ERA ballot issue in Nevada is the first test of the proposed constitutional amendment since Congress earlier this month added 39 months to the original seven-year period for states to ratify the measure.

For this reason, the issue is considered crucial by both sides. Though the Nevada ballot measure is only advisory, so many legislators have promised to abide by the results that the vote is considered almost certain to determine the outcome of ERA in Nevada.

A victory here would be particularly significant for ERA advocates, who, even with the extension, may have difficult time finding the three more states needed to make the amendment part of the Constitution. Thirty-five states have ratified thus far.

Since ERA expectations in Nevada are low, approval here would be certain to give supporters a much-needed boost.

And while the prevailing view here is that the ERA initiative will fail, some think the issue will be very close and that passage of the advisory issue is possible.

***Reno Evening Gazette*, March 7, 1978**

LEAVITT AIRS VIEWS ON ERA

FILES FOR LIEUTENANT GOVERNOR

[Photo
Appeared
Here]

Myron Leavitt

By LEE ADLER
Gazette-Journal—Carson Bureau

Las Vegas City Commissioner Myron E. Leavitt Monday filed for the Democratic nomination for lieutenant governor, saying he would break a possible tie vote in favor of the Equal Rights Amendment if a majority of Nevada voters favor it in November's advisory referendum.

The 47-year-old Leavitt explained that he opposes the anti-sex discrimination both "because it's not good law and because it's vague and ambiguous.

But he said he would vote for it if most of the voters do because "I believe in representative democracy."

Lieutenant Governor Bob Rose generated considerable controversy during the 1977 season by casting the tie-breaking vote that enabled ERA to pass the state Senate en route to a defeat in the Assembly.

Leavitt said Monday he agrees that Rose has the constitutional right to break such ties and he would do the same if he were elected.

Like a growing number of Democrats, Leavitt said he favors some form of tax relief, whether it be a cut in property taxes or sales tax.

He said the state's estimated $60 million surplus "is too much" and some of it should be returned to the people.

Leavitt then qualified his statement saying tax relief should be granted only when "we've made sure the surplus isn't artificial, is one that we can look forward to in the future.

At any rate, he said, the state should retain a bedrock $20 million to $25 million surplus in order to be equipped to handle unforseen emergencies.

Leavitt, who lost to James Santini in the 1974 Democratic congressional primary, estimated it would cost him $113,000 to win the nomination as lieutenant governor.

He said he will campaign by "meeting as many people as I can, shaking as many hands as I can."

He said also he favored expanding the role of the lieutenant governor to include such things as taking charge of the Office of Economic Development, which works in part to bring more business and industry to the state.

He said he also favors the lieutenant governor continuing in his role as president of the state Senate.

Leavitt holds a journalism degree from the University of Nevada and a law degree from the University of Utah.

He has served as deputy city attorney of North Las Vegas; Las Vegas Justice of the Peace; chairman of the Clark County Commission; and a member of the Las Vegas Metropolitan Police Commission.

To date, Carson City resident Olga Bond Covelli is the only other Democrat to officially enter the race.

Rose has said he is seeking the governorship.

Assembly Line

A Special Report From Assemblyman Bob Robinson

In the spring of 1976, I initiated a policy of sending a report to the residents of Assembly District 8 to advise you of major actions of the Nevada legislature.

This report is designed to outline many of our actions and, hopefully, to encourage your comments and opinions. I would appreciate having your thoughts about the matters outlined in this report or any other actions taken by the legislature.

Fiscal Responsibility

The 1977 Nevada legislature continued to exercise fiscal responsibility, which has resulted in Nevada being one of the most financially sound states in the nation.

We were able to fund a number of greatly needed projects and programs. Not only did we do so *without any increase in taxes*, we are anticipating a budget surplus of more than $50 million by the time the legislature meets again a year from now.

We authorized $58 million for capital improvements throughout the state—at the University of Nevada, Las Vegas, University of Nevada, Reno, our community colleges, and $8 million to improve our prison facilities at Jean and Carson City.

We also cut several million in requests for capital improvement funds for national guard armories.

Additionally, we created and appropriated funds for two new state parks—including the Tule Springs Park not far from our district.

Consolidation

One of the most controversial measures considered by the legislature was whether to consolidate city and county government in Clark County.

Since few matters so greatly affect all of us as our system of government, we decided that the residents of the City of Las Vegas and the residents of those unincorporated areas which would be added to the City of Las Vegas under consolidation should ultimately decide whether they want a new and consolidated government.

That question will be on the ballot in the *primary election* in September. If *both* the people of the City *and* the residents of the unincorporated areas vote in favor of the issue, we will have a consolidated government.

I felt it best that the people directly affected should have the final decision about what kind of government they support.

Equal Rights Amendment

A second question will be voted on directly by the people next year.

On the *general election* ballot in November you will be asked to vote for or against the Equal Rights Amendment (ERA).

Clearly the most controversial issue of the last two legislative sessions, ERA has three times been defeated in Nevada—by the Senate in 1973 and 1975 and by the Assembly in 1977.

In my view, much more heat than light has been shed on this issue in the last few years and I believe that because of the controversy and strong feelings surrounding the issue, it should be taken to the people.

My position is clear—if a majority of the voters of Assembly District 8 oppose the issue, I will vote against it if I am returned to the Assembly in 1979; if a majority supports it, I will support it also. I will vote the position taken by a majority of our District.

Government Bureaucracies

Landmark legislation was passed which will have significant effect on those government workers who sometimes believe they can write into government regulations matters not intended by the legislature.

The sweeping and landmark legislation provides that all government regulations be codified as are our Nevada Revised Statutes, and that no regulations promulgated by an agency become effective until approved by the legislature or the Legislative Commission.

This is a most welcome step toward stopping the ever-increasing authority of bureaucrats.

Downtown Convention Facility

In the closing weeks of the session, we passed legislation to provide for a convention facility and sports complex in downtown Las Vegas.

This facility would benefit our local citizens and our many tourists alike.

Of more importance, it will not cost any local resident one penny!

Energy

The challenges of conserving energy and finding new sources of energy for the future are not confined solely to the federal level.

In Nevada, we have created a new State Department of Energy. Moreover, we passed this year some 17 bills on the subject of energy.

More on this critical subject will be tackled by the next session of the legislature.

Education

The largest single area of expenditure of our state budget is for education.

Appropriations for our school systems was up 13 per cent per pupil in 1977-78 and will increase 8 per cent more in 1978-79.

We mandated a new program this year to help insure that everyone—students and taxpayers—are getting a proper return on the education dollars spent.

The new program requires passage of achievement tests by a student in order to receive a high school diploma.

Nevada Appeal, Tuesday, January 31, 1978

ERA Supporters Handed Setback In Court Ruling

By United Press International

District Judge Mike Fondi Monday handed supporters of the Equal Rights Amendment a setback when he ruled the question could be submitted to the voters in November in a straw ballot.

Fondi held the 1977 Nevada Legislature acted within the law in calling for a statewide advisory opinion on ERA which has been defeated in the last three sessions.

Mrs. Phyllis H. Atkins, Reno attorney for those backing ERA, said the case would be appealed immediately to the Nevada Supreme Court in an effort to keep the question off the ballot.

Lawmakers, tired of hearing conflicting opinions about the attitudes of Nevadans, approved a law putting the question on the ballot but the results would not be binding on the 1979 Legislature.

A group of persons from Washoe County, including Isabel Kimbell and former Assemblywoman Mary Frazzini, sought to have the law declared invalid and the question removed from the ballot.

Fondi said the law violates neither the U.S. or Nevada Constitutions. He said however it would have been invalid if the outcome of the election would have been binding on the 1979 Legislature.

But Fondi pointed out lawmakers may be elected entirely of one view and the voters may express another. Yet the legislators can vote how they want.

Deputy Attorney General Donald Klasie and Legislative Counsel Frank Daykin both suggested the Legislature could

pass any law it desires as long as it was not expressly prohibited by the state and federal constitutions.

Klasic said the lawmakers wanted to get acquainted with the feelings of the voters and this was better than the "hit and miss" of opinion polls and lobbyists.

Daykin questioned the legality of the pro ERA group to bring the suit. Judge Fondi said he could take the easy way out and dismiss the suit on legal technicalities. But he said the group had legal standing to bring the suit and there was a justified controversy.

The judge said it was "very evident we will have the Supremes make the final decision because of the issuing and the importance of it."

Mrs. Atkins said amendments to the U.S. Constitution can be ratified only by the legislatures of the states or a constitutional convention. She said the voters do not enter into this process. She argued it was a useless law and it does not bind the lawmakers to follow the results.

"Courts have kept these types of questions off the ballot," she said. She added the legislature could not delegate its power to the people in ratification of a U.S. Constitutional amendment.

"The 50th session is using taxpayers money to lobby the next legislature," she complained.

But Daykin replied the 1977 Legislature did not take a position and did not require the 1979 session to follow the results so this was not lobbying.

In making his decision, Fondi said many laws on the books have non-binding effects on people and that reason alone does not make them invalid. He agreed the U.S. Constitution sets out the method for ratifying constitutional amendments.

But the judge said in this case the advisory vote was not part of the ratification process of the U.S. Constitution.

After the decision, Attorney General Robert List issued a statement praising the ruling and said, "Now for the first time, the people who are going to be affected by the ERA, whether it is adopted or now, are going to have a voice in it. That's the way it should be."

He said the lawmakers have a duty to know the interests of their constituents. "Now they are going to have that loud and clear on Nov. 7. Some politicians, both for and against the ERA, are going to be displeased with this decision."

Supreme Court, U. S.
FILED
NOV 20 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78–657

ISABEL KIMBLE, BRUCE BLACKDAR, MARY FRAZZINI, THEODORE OLESON, JR., MARJORIE DA COSTA EASTMAN,

Appellants,

v.

WILLIAM D. SWACKHAMER, Secretary of State of the State of Nevada, and LEGISLATIVE COMMISSION OF THE STATE OF NEVADA, Intervenor,

Appellees.

On Appeal From the Supreme Court of Nevada

MOTION OF APPELLEE WILLIAM D. SWACKHAMER TO DISMISS OR AFFIRM

Robert Frank List
Attorney General

Donald F. Klasic
Deputy Attorney General

Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710
(702) 885-4170

Counsel for Appellee
William D. Swackhamer

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78-657

ISABEL KIMBLE, BRUCE BLACKDAR, MARY FRAZZINI, THEODORE OLESON, JR., MARJORIE DA COSTA EASTMAN,

Appellants,

v.

WILLIAM D. SWACKHAMER, Secretary of State of the State of Nevada,

and

LEGISLATIVE COMMISSION OF THE STATE OF NEVADA, Intervenor,

Appellees.

On Appeal From The Supreme Court Of Nevada

MOTION OF APPELLEE WILLIAM D. SWACKHAMER TO DISMISS OR AFFIRM

Robert Frank List
Attorney General

Donald F. Klasic
Deputy Attorney General

Counsel For Appellee
William D. Swackhamer

INDEX

	Page
Opinions Below	2
Question Presented By This Appeal	2
Constitutional Provisions and Statutes	3
The State Statute Involved And The Nature of The Case	7
A. The Statute	7
B. Facts And Proceedings Below	8
Argument	9
I. The Appeal Should Be Dismissed Because It Is Moot	9
II. This Appeal Should Be Dismissed Or Affirmed Because The Question Raised By The Appeal Is Not Substantial	15
Conclusion	24
Appendix	1a et seq.

CITATIONS

Cases:	Pages
Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937)	11

Cases: Pages

Albertson v. Millard, 345 U.S. 242 (1953). 21

Barlotti v. Lyons, 182 Cal. 575, 189 P. 282 (1920). 17

Brockington v. Rhodes, 396 U.S. 41 (1969) 10

De Funis v. Odegaard, 416 U.S. 312 (1974). 13

Dunn v. Blumstein, 405 U.S. 330 (1972) 13, 14

Equitable Life Assurance Society v. Brown, 187 U.S. 308 (1902) 16

Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) 13

Guaranty Trust v. Blodgett, 287 U.S. 509 (1933). 21

Gill v. Morris, 79 Okla. 89, 191 P. 364 (1920). 17

Hall v. Beals, 396 U.S. 45 (1969). 13

Hatch v. Murray, 165 Mont. 92, 526 P.2d 1369 (1974) 17

Hawke v. Smith, 100 Ohio St., 385, 126 N.E. 400 (1919) 17

Hawke v. Smith, 253 U.S. 221 (1920) 16, 17, 18, 19, 20, 21, 23

Cases: Pages

Herbring v. Brown, 92 Ore. 176, 180 P. 328 (1919). 17

Hortonville District v. Hortonville Education Assoc., 426 U.S. 482 (1976) 21

In re Opinion of the Justices, 188 Me. 544, 107 A. 673 (1919). . . 17

Kimble v. Swackhamer, 94 Nev. Adv. Op. 169 (decided September 19, 1978) 2

Kimble v. Swackhamer, _____ U.S. _____, No. A-354 (78-657) slip op. (Rehnquist, Circuit Justice, October 20, 1978) 23

Kingsley Pictures Corp. v. Regents, 360 U.S. 684 (1959). . . . 21

Las Vegas Police Protective Association v. City of Las Vegas, 89 Nev. 394, 513 P.2d 1231 (1973) 20

Leser v. Garnett, 258 U.S. 130 (1922) 16, 18, 19, 21, 22, 23

Liner v. Jafco, Inc., 375 U.S. 301 (1964) 11

Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270 (1941) 11

Moore v. Ogilvie, 394 U.S. 814 (1969) 14

Cases	Pages
North Carolina v. Rice, 404 U.S. 244 (1971)	11
Preiser v. Newkirk, 422 U.S. 395 (1975)	11, 13
Prior v. Noland, 68 Colo 263, 188 P. 729 (1920)	17
Richardson v. McChesney, 218 U.S. 487 (1910)	10
Roe v. Wade, 410 U.S. 113 (1973)	13
State ex rel Tate v. Sevier, 333 Mo. 622, 62 S.W.2d 895 (1933)	18
Securities Exchange Commission v. Medical Committee, 404 U.S. 403 (1972)	13
Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911)	13
Steffel v. Thompson, 415 U.S. 452 (1974)	11
Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974)	14
Trombetta v. Florida, 353 F.Supp. 575 (M.D. Fla 1973)	18, 22
United States v. SCRAP, 412 U.S. 669 (1973)	12
Walker v. Dunn, 498 S.W.2d 102 (Tenn. 1972)	18, 22

	Pages
Constitutions and Statutes:	
U.S. Const., art. III	11
U.S. Const., art. V	2 et passim
Nev. Const., art. 4, §2	9, 22
Nev. Const., art. 5, §9	22
Nev. Rev. Stat. §293.395	9-10
Chapter 174, Nev. Stat. 1977	2 et passim
Other Authorities:	
Dodd, Amending the Constitution, 30 Yale L.Rev. 321 (1921)	17
1 Kent, Commentaries, 460 (14th ed. 1896)	20
82 C.J.S., Statutes, §115	20

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-657

ISABEL KIMBLE, BRUCE BLACKDAR, MARY FRAZZINI, THEODORE OLESON, JR., MARJORIE DA COSTA EASTMAN,

Appellants,

v.

WILLIAM D. SWACKHAMER, Secretary of State of the State of Nevada,

and

LEGISLATIVE COMMISSION OF THE STATE OF NEVADA, Intervenor,

Appellees.

On Appeal From The Supreme Court Of Nevada

MOTION OF APPELLEE WILLIAM D. SWACKHAMER TO DISMISS OR AFFIRM

Appellee William D. Swackhamer moves the Court to (1) dismiss the ap-

peal herein because of mootness or (2) dismiss the appeal or, in the alternative, affirm the judgment of the Supreme Court of Nevada on the grounds that it is manifest that the question on which the decision of the cause depends is so unsubstantial as not to need further argument.

OPINIONS BELOW

The opinion of the Nevada Supreme Court which appears in the appendix hereto, p. 1a, infra, has appeared as a slip opinion, 94 Nev. Adv. Op. 169 (decided September 19, 1978).

The opinion of the First Judicial District Court of Nevada In And For Carson City, dated January 31, 1978, which appears in the appendix hereto, p. 10a, infra, is not reported.

QUESTION PRESENTED BY THIS APPEAL

Does Chapter 174, Nev. Stat. 1977 violate Article V of the United States Constitution by limiting, in any way, the power of the Nevada Legislature to either ratify or refuse to ratify a proposed amendment to the United States Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES

Article V, Constitution of the United States:

> The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several states shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress: Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its consent, shall be deprived of its equal Suffrage in the Senate.

Chapter 174, Nevada Statutes, 1977:

CHAPTER 174

AN ACT relating to a proposed amendment to the United States Constitution; providing an advisory referendum on ratification of the equal rights amendment; and providing other matters properly relating thereto.

[Approved April 12, 1977]

The People of the State of Nevada, represented in Senate and Assembly do enact as follows:

Section 1. At the general election on November 7, 1978, an advisory question shall be submitted to the registered voters of this state on the ratification of the proposed amendment to the Constitution of the United States known as the equal rights amendment.

Sec. 2. At the time and in the manner provided by law, the secretary of state shall transmit the question to the several county clerks, and the county clerks shall cause it to be published and posted as provided by law.

Sec. 3. The proclamation and notice to the voters given by the county clerks pursuant to law shall be in substantially the following form:

> Notice is hereby given that at the general election on November 7, 1978, an advisory question will appear on the ballot relating to the ratification of the following proposed amendment to the United States Constitution:
>
> 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> 3. This amendment shall take effect two years after the date of ratification.

> THE RESULT OF THE VOTING ON THIS QUESTION DOES NOT PLACE ANY LEGAL REQUIREMENT ON THE LEGISLATURE OR ANY OF ITS MEMBERS.

Sec. 4. The ballot page assemblies and the paper ballots to be used in voting on the advisory question shall present the question in substantially the following form:

> Do you recommend that the Nevada legislature ratify the following proposed amendment to the United States Constitution, commonly known as the equal rights amendment?
>
> Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> Sec. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> Sec. 3. This amendment shall take effect two years after the date of ratification.
>
> Yes_____NO_____

Sec. 5. The explanation of the question which shall appear on each paper ballot and sample ballot and in every publication and posting of notice of the question shall be in substantially the following form:

(Explanation of the Advisory Question)

Nevada has not yet ratified the "Equal Rights Amendment" to the United States Constitution. A "Yes" vote on this advisory question would recommend that the Nevada legislature take action to ratify that amendment. A "No" vote on this advisory question would recommend that the Nevada legislature refrain from taking action to ratify that amendment.

THE RESULT OF THE VOTING ON THIS QUESTION DOES NOT PLACE ANY LEGAL REQUIREMENT ON THE LEGISLATURE OR ANY OF ITS MEMBERS.

Sec. 6. If a majority of the votes cast on the question is yes, the secretary of state shall certify the result to the president of the senate and the speaker of the assembly as the recommendation of the registered voters of the state, that the proposed amendment to the Constitution of the United States be ratified by Nevada. If a majority of the votes cast on the question is no, the secretary of state shall certify the result as the recommendation of the registered voters of the state, that the legislature should not ratify the amendment.

Sec. 7. All general election laws not inconsistent with this act are applicable.

Sec. 8. The question required by this act shall not be placed on any ballot, nor shall any other action which is required by this act be taken,

if:

1. The Nevada legislature has ratified the proposed amendment on or before July 1, 1977; or

2. The legislatures of 38 other states have ratified the proposed amendment, and the United States Congress has accepted their ratification, on or before July 1, 1978.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

The appeal raises the question of whether Chapter 174, Nev. Stat. 1977 is repugnant to Article V of the United States Constitution. Chapter 174 is an act of the Nevada Legislature directing the Nevada Secretary of State and the various Nevada county clerks to place an advisory question upon the November 7, 1978 general election ballot. The format of the advisory question as it is to be published, printed on the ballot and explained to the voters is set forth in detail in the statute. After the tabulation of the vote, the results are to be transmitted by the Secretary of State to the President of the Nevada Senate and the Speaker of the Nevada Assembly.

The advisory question to be placed on the ballot concerns the proposed equal rights amendment to the United States Constitution and seeks the advice of the voters as to whether they recommend that the Nevada Legislature ratify the proposed amendment or not. The statute

clearly specifies, and directs that this be made known to the voters, that the result of the balloting does not place any legal requirement on the legislature or any of its members. The explanation of the question to be placed on paper ballots and sample ballots specifies that this is an advisory question, and it is so designated in Section 1 of this statute.

B. Facts And Proceedings Below

The Nevada Legislature, which meets biennially, convened its last session on January 17, 1977. As had been the case in the 1973 and 1975 Legislatures, when ratification was rejected both times, the proposed equal rights amendment was presented to the 1977 Nevada Legislature for ratification. The Senate, after a controversial and disputed tie-breaking vote by the Lieutenant Governor, ratified the measure on February 8, 1977, but the Assembly rejected the measure on February 11, 1977. Subsequently, Chapter 174, Nev. Stat. 1977 was enacted and approved on April 12, 1977. The legislature adjourned on May 9, 1977.

On November 8, 1977, appellants instituted an action in the Nevada state courts for a declaratory judgment that Chapter 174 was unconstituional and for an injunction to prevent the Secretary of State from acting to put the advisory question on the ballot. Jurisdictional Statement, p. 10. On January 31, 1978, the First Judicial District Court In And For Carson City found that Chapter 174 did not violate

Article V and entered judgment for the appellees herein and against appellants. An appeal was taken to the Nevada Supreme Court shortly thereafter and the Nevada Supreme Court affirmed the judgment of the lower court on September 19, 1978. On October 2, 1978, the appellants filed their notice of appeal with the Nevada Supreme Court. Finally, the appellants filed their Jurisdictional Statement with the United States Supreme Court on October 18, 1978.

ARGUMENT

I

The Appeal Should Be Dismissed Because It Is Moot

The provisions of Chapter 174, Nev. Stat. 1977 pertaining to the placement of the advisory question on the ballot in Nevada applies only to the November 7, 1978 election. The election has been held and the question, known as Question No. 5, did appear on the ballot. While the remaining provisions of Chapter 174 requiring the Secretary of State to transmit the results of the vote to the presiding officers of the legislature will not take place until the legislature meets on January 15, 1979 (the third Monday in January; see Nev. Const., art. 4, §2), this is a pure formality as far as notice of the election's results are concerned. The vote on Question No. 5 has been tabulated and the unofficial results, to be made official by the canvass of the Nevada Supreme Court on November 22, 1978 (the fourth Wednesday in November; see Nev.

Rev. Stat. § 293.395), have been widely published throughout the state. It may be assumed, therefore, that the legislators will be aware of the results of the vote on the question regardless of the final disposition of this appeal.[1]

The appellants are requesting a declaratory judgment that Chapter 174 is unconstitutional and for injunctive relief to prohibit its placement on the November 7, 1978 ballot. Their action is not a class action. However, as noted above, the November 7 election has been held and the advisory question was voted on and so the injunctive relief sought is moot since the event sought to be enjoined has occurred and cannot be undone. Richardson v. McChesney, 218 U.S. 487, 492 (1910); Cf. Brockington v. Rhodes, 396 U.S. 41, 43 (1969).

With respect to the declaratory relief requested, it should be noted that the only declaratory relief that could be given to appellants is that Chapter 174, which is applicable only to the November 7, 1978 ballot, is unconstitutional and should not be on the ballot on November 7. But Chapter 174, after transmission of the results of the vote on the advisory question to the legislature in January, 1979, will run its course and will forever cease to operate. The statute does not provide

---

1 There were 61,748 votes in favor of advising ratification of the equal rights amendment and 123,691 votes opposed. (Unofficial results)

for other advisory votes on the equal rights amendment, even assuming the proposed amendment does not become ratified by the legislature in 1979. Since the event which the appellants sought to prevent by their declaratory judgment action has taken place with no foreseeable chance of occurring again, no real and substantial controversy exists any longer between parties having adverse interests. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1937); Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941).

A live controversy must be extant at all stages of appellate review and not merely at the time the complaint is filed. Preiser v. Newkirk, 422 U.S. 395, 401, (1975); Steffel v. Thompson, 415 U.S. 452, 459, n. 10 (1974). Mootness is a jurisdictional question, because the Supreme Court has held that it has no power to issue advisory opinions or abstract propositions. North Carolina v. Rice, 404 U.S. 244, 246 (1971). The Court has stated that its inability to review moot questions arises from the requirement of Article III of the United States Constitution that the exercise of federal judicial power depends on the existence of a case or controversy. Liner v. Jafco, Inc., 375 U.S. 301, 306, n. 3 (1964). Thus, a federal court cannot decide questions that can not affect the rights of litigants in the case before it. North Carolina v. Rice, supra at 246.

That is the situation before the court in the present case. The controversy between appellants and appellees is no

longer of sufficient reality to continue jurisdiction in this Court. The sole issue is whether Chapter 174, which can apply only to the Nevada general election of November 7, 1978, is constitutional. Appellant's interest in this question is whether the advisory question may permissibly be put on the November 7 ballot. The election occurred and so the request for declaratory relief is moot. The appellants no longer have an interest to protect.

It is possible that the equal rights amendment will not be ratified in the 1979 Nevada Legislature and it is possible that the legislature, anticipating re-introduction of the proposed amendment in the 1981 Nevada Legislature, may wish to enact another law to put the advisory question again on the ballot for 1980. However, this is pure speculation since it is not known whether the equal rights amendment will be ratified or not next legislative session, nor, assuming it is not, that the legislature believes another advisory question is desireable.

> "...[P]leadings must be more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action." United States v. SCRAP, 412 U.S. 669, 688-689 (1973)

Issues based on speculation do not pre-

sent a justicable controversy nor afford grounds for reaching substantive decisions. Hall v. Beals, 396 U.S. 45, 49 (1969); Preiser v. Newkirk, supra at 403; Securities Exchange Commission v. Medical Committee, 404 U.S. 403, 406 (1972).

Nor does this case present an exception to the mootness doctrine by virtue of the fact situation being "capable of repetition, yet evading review." Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911). Unlike Roe v. Wade, 410 U.S. 113, 125 (1973), the fact situation here does not present a matter that necessarily will always be resolved long before appellate review can be completed to its fullest extent. If the Nevada Legislature does find it necessary to enact another law providing for an advisory question on the equal rights amendment, potential plaintiffs will have over a year and a half from the legislature's usual adjournment in late April or early May of odd-numbered years and the next general election in even-numbered years. Indeed, if appellants in the present case had filed their action immediately after the April 12, 1977 approval of Chapter 174 instead of waiting seven months until November 8, 1977, the Supreme Court could have been able to have heard and decided the case before the election.

This is not a class action and thus there is no live controversy among any remaining class members. Franks v. Bowman Transportation Co., 424 U.S. 747, 752-757 (1976); DeFunis v. Odegaard, 416 U.S. 312, 317 (1974); Dunn v. Blumstein, 405 U.S. 330, 333, n.2 (1972). This is

not a case where the statute continues in existence thereby continuing to threaten the interests of other persons in a situation that is capable of repetition, yet evading review. Dunn v. Blumstein, supra; Moore v. Ogilvie, 394 U.S. 814, 816 (1969). Here, as stated above, Chapter 174 forever ceases to operate after the transmission of the vote on the advisory question to the legislature on January 15, 1979.

Thus, the governmental activity involved here does not constitue a "continuing and brooding presence" which creates a substantial adverse effect on the appellants or other persons claiming to be aggrieved by Chapter 174. Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 122 (1974). The possibility of the future enactment of a law similar to Chapter 174 does not present a problem capable of repetition, yet evading review since the enactment of such a law is removed two steps from reality--the necessity of non-ratification of the equal rights amendment in the 1979 Nevada Legislature and that legislature's discretion in deciding whether or not to enact a law similar to Chapter 174. Cf. Super Tire Engineering Co. v. McCorkle, supra at 123.

Chapter 174, Nev. Stats. 1977, being directed only at the November 7, 1978 general election in Nevada and such election having been held with the advisory question being voted on and the votes counted, neither declaratory nor injunctive relief is now warranted. The result which appellants sought to avoid by such declaratory or injunctive relief has come

to pass. There is no longer an immediate and real controversy. This matter is now moot and should be dismissed on that basis.

II

This Appeal Should Be Dismissed Or Affirmed Because The Question Raised By The Appeal Is Not Substantial

The advisory question, which was required by Chapter 174, Nev. Stat. 1977 to be placed on the November 7, 1978 ballot, is a non-binding vote of the people which would do no more than advise the Nevada Legislature of the opinions of the voters on the question of the ratification of a proposed equal rights amendment to the United States Constitution. Chapter 174 does not limit, control or direct the legislature to do anything with regard to the proposed amendment. The legislature and its individual members are perfectly free to act or not act on this matter regardless of the result of the election on the advisory question. These, in essence, are the terms of Chapter 174 and, necessarily therefore, constitute the holding of the Nevada Supreme Court. Appendix, p. 1a.

The appellants contend the statute is repugnant to Article V of the United States Constitution and thus raises a substantial federal question. However, this Court has very early held that the mere allegation of a federal question is not enough to confer jurisdiction in the Court. If the question raised is devoid of merit or has been foreclosed by decisions of the Court as to leave no room for a real controversy, a motion to dismiss an ap-

peal will prevail. Equitable Life Assurance Society v. Brown, 187 U.S. 308, 311 (1902).

In this matter, the decisions of this Court which foreclose argument and leave no room for real controversy are Hawke v. Smith, 253 U.S. 221 (1920) and Leser v. Garnett, 258 U.S. 130 (1922).

In Hawke v. Smith the Supreme Court considered a case in which the Ohio Legislature had previously ratified a proposed amendment to the United States Constitution. Subsequently, following the authorization of the Ohio Constitution, there was an attempted binding referendum vote of the people on the Ohio Legislature's ratification action. The Supreme Court noted that the means for ratifying amendments to the United States Constitution rested exclusively with the legislatures of the states or state conventions, as determined by Congress. No provision was made in Article V for ratification by direct action of the people, as would be the case with a binding referendum which would have the effect of approving or rejecting the action of the legislature, thereby approving or rejecting the ratification of the amendment by the people. Such action could be taken only by the representatives of the people in legislatures or conventions. The referendum provisions of the Ohio Constitution in this regard were held to be in violation of Article V so far as applicable to the ratification of an amendment to the United States Constitution. [2]

Such a binding referendum on a prior

legislative ratification of a federal constitutional amendment would subvert the authority of the legislatures to ratify such amendments. "The view taken by the Court [in Hawke v. Smith] clearly makes it improper for a state constitution to impose limitations upon the exercise by the legislature of its power to ratify a federal constitutional amendment." (Emphasis added) Dodd, Amending the Constitution, 30 Yale L.Rev. 321, 344 (1921). The cases cited by the appellants in their Jurisdictional Statement, pp. 13-14, to support their contention that Chapter 174 violates Article V, Prior v. Noland, 68 Colo. 263, 188 P. 729 (1920); In re Opinion of the Justices, 188 Me. 544, 107 A. 673 (1919); Gill v. Morris, 79 Okla. 89, 191 P. 364 (1920); Hatch v. Murray, 165 Mont. 92, 526 P.2d 1369 (1974); Barlotti v. Lyons, 182 Cal. 575, 189 P. 282 (1920); Herbring v. Brown, 92 Ore. 176, 180 P. 328 (1919), all reach the same conclusion as Hawke v. Smith and upon identical facts. That is, each case dealt with the question of whether a binding referendum vote of the people could be held on a prior ratification of a federal constitutional amendment by a state legislature. Each concluded that

---

2. The appellants are in error when they state in the Jurisdictional Statement, p. 13, that this case arose in Maine and affirmed sub. nom, In re Opinion of the Justices, 188 Me. 544, 107 A. 673 (1919). The case arose in Ohio and reversed Hawke v. Smith, 100 Ohio St. 385, 126 N.E. 400 (1919).

such a vote could not be held and for the same reasons noted in Hawke v. Smith.

Leser v. Garnett, supra considered a case in which state constitutions specifically provided that a legislature could not consider a proposed constitutional amendment unless a majority of its members were elected after the amendment was submitted to the legislature. Although this was not a limitation on how legislators were to vote, nor constituted a referendum on prior action by the legislature, it was a limitation on when a legislature could ratify an amendment to the United States Constitution. The legislative session then sitting when the amendment was submitted by Congress was specifically prohibited from acting. The law provided that only a future session of the legislature could act. The Supreme Court held such provisions invalid as contrary to the provisions of Article V, since Article V imposed no limitation upon which session of a state legislature could ratify an amendment or when it could do so. In this regard, the federal constitution "...transcends any limitations sought to be imposed by the people of a state." (Emphasis added) Leser v. Garnet, supra at 137.

Cases relying on Leser v. Garnett on the same question are Walker v. Dunn, 498 S.W.2d 102 (Tenn. 1972); Trombetta v. Florida, 353 F.Supp. 575 (M.D. Fla. 1973)

One final type of limitation on Article V that has been held unconstitutional was considered in State ex rel Tate v. Sevier, 333 Mo. 622, 62

S.W.2d 895 (1933), also cited by appellants. Jurisdictional Statement, p. 14. Here, Congress directed that states adopt a federal constitutional amendment by conventions. Missouri enacted a law to elect a convention, but opponents of the constitutional amendment acted to put the law to a binding referendum vote of the people. Relying on Hawke v. Smith and Leser v. Garnett, the Missouri court held this was an attempt to use a state law to place a limitation on the federal ratification process since, if the people voted against the law providing for a convention there would be no convention in Missouri and no means for the state to ratify or reject the amendment, despite the clear direction of Congress, pursuant to Article V, that a convention be called.

The clear holding of this Court in Hawke v. Smith and Leser v. Garnett is that whenever a state attempts to place a limitation on its legislature in ratifying or refusing to ratify a federal constitutional amendment, such a limitation interferes with the ratification process of Article V and so is unconstitutional. Such limitations may take the form of binding referendum votes of the people on prior legislative ratifications, which conceivably could have the effect of rejecting legislative ratifications, or such limitations could attempt to direct when a legislature may ratify an amendment. Chapter 174 fits neither category.

Chapter 174 requires a question to be put on the November 7, 1978 ballot. The question is expressly made advisory. It does not bind the legislature in any way. It does not modify or alter the process

of ratification since the legislature is free to act as it sees fit and when it sees fit, all in accordance with Article V. The question is not even a referendum since no previous action of the legislature has taken place to ratify the amendment. A referendum is "...the right of the people to have submitted for their approval any act or part thereof passed by the legislature." 82 C.J.S., Statutes, § 115.[3] The statute, therefore, is not contrary to the holding in Hawke v. Smith.

Appellants hint that the question, despite its advisory nature, is actually considered binding by the legislators and they attach three newspaper articles and a newsletter to their Jurisdictional Statement as "proof". Jurisdictional Statement, p. 16; appendix to Jurisdictional Statement, pp. 15a-26a.

First, however, the trial court found that Chapter 174 was not binding on the legis-

/

3. Although the title to Chapter 174 mentions the words "advisory referendum", the body of the statute consistently calls the matter an "advisory question". In Nevada the title of a statute does not control its meaning unless necessary to clear up an ambiguity. Las Vegas Police Protective Association v. City of Las Vegas, 89 Nev. 394, 396, 513 P.2d 1231 (1973). Titles are loosely and carelessly inserted and are not a safe exposition of the law. 1 Kent, Commentarie 460 (14th ed. 1896).

lature and this was affirmed by the Nevada Supreme Court. Appendix, pp. 1a and 10a. In considering a federal question, this Court has held it is bound by a state court's construction of a state statute. Hortonville District v. Hortonville Education Assoc., 426 U.S. 482, 488 (1976); Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 688 (1959); Albertson v. Millard, 345 U.S. 242, 244 (1953); Guaranty Trust v. Blodgett, 287 U.S. 509, 512 (1933).

Second, neither the newspaper articles nor the newsletter constitute any kind of competent evidence. None were properly introduced as evidence into the trial court and none of the statements were given under oath either by the persons allegedly making them nor by the authors of the articles. They all constitute hearsay, and in only one are the statements contained therein even attributable to a legislator, and he is only one state legislator out of sixty in Nevada.

Appellants contend, however, that Chapter 174 is contrary to the holding of Leser v. Garnett, if not Hawke v. Smith, because the statute requires the legislature to defer action until after the vote is tabulated on the advisory question and after a majority of legislators are elected on November 7, 1978, thereby limiting when a legislative session could act on ratification. Jurisdictional Statement, pp. 17-18.

A mere reading of the statute will demonstrate the falsity of this argument. There is nothing in the statute which in any way requires the legislature to do

anything. Chapter 174 was approved on April 12, 1977 and the legislature adjourned May 9, 1977, not to meet again until its next biennial session on January 15, 1979. (Nev. Const. art. 4, § 2). There was nothing to prevent the legislature from again considering the proposed equal rights amendment during the last month of its 1977 session, nor would the legislature have been prevented from considering the amendment in special session had one been called between biennial sessions (Nev. Const., art. 5, § 9). Indeed, Section 8 of Chapter 174 actually contemplated the possibility that the legislature, in regular session, could have taken action on the amendment prior to July 1, 1977. The fact that these events did not occur was not at the direction of Chapter 174.

Obviously, since the legislature meets biennially with its next session beginning January 15, 1979, it stands to reason that the election to be held in the meantime on November 7, 1978 will result in a majority of the legislators being elected to the new legislature. (One half of the Senate and all of the Assembly were elected). Once again, this is not at the discretion of Chapter 174, unlike the state constitutional provisions found invalid in Leser v. Garnett, supra, Walker v. Dunn, supra and Trombetta v. Florida, supra. Chapter 174 does not require this situation and there was nothing prohibiting the legislature from meeting at any time between April 12, 1977 and November 7, 1978, to consider the equal rights amendment. As Justice Rehnquist stated in his opinion in this case rejecting appellants' request for an injunction, "That

the Nevada Legislature is unlikely to vote on the amendment before a referendum that it mandated is not a constitutionally cognizable grievance." (Justice Rehnquist's emphasis). Kimble v. Swackhamer, ____ U.S. _____, No. A-354 (78-657), slip op. p.2 (Rehnquist, Circuit Justice, October 20, 1978).

In summary, then, the decisions of this Court in Hawke v. Smith and Leser v. Garnett make it clear that whenever there is any attempt by a state to place a limitation on the right of a legislature to freely act upon a proposed federal constitutional amendment, whether, for example, by a binding referendum or by limiting when a legislature may so act, Article V of the United States Constitution is violated. It surely follows that when no such limitation is placed on the right of the legislature to so act, Article V is not violated. Chapter 174, Nev. Stat. 1977 places no such limitations on the right of the Nevada Legislature to act in either ratifying or refusing to ratify the proposed equal rights amendment. Chapter 174 places no restriction on when the legislature may act nor does it make the results of the vote on the advisory question binding on the legislature or its members.

The decisions of this Court in Hawke v. Smith, and Leser v. Garnett demonstrate that this appeal is devoid of merit and is so foreclosed by the aforesaid decisions as to leave no room for real controversy. The federal question thus presented by the appeal is not substantial.

Conclusion

For these reasons, appellee William D. Swackhamer respectfully requests this Court to (1) dismiss the appeal in this case for mootness or (2) dismiss the appeal or, in the alternative, affirm the judgment of the Nevada Supreme Court on the grounds the federal question presented is so unsubstantial as to need no further argument.

Dated this 10th day of November, 1978.

Respectfully submitted,

Robert Frank List
Attorney General

Donald F. Klasic
Deputy Attorney General
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710
(702) 885-4170

Counsel for Appellee
William D. Swackhamer

APPENDIX

IN THE SUPREME COURT OF THE STATE OF NEVADA

ISABEL KIMBLE, BRUCE BLACKADAR, MARY FRAZZINI, THEODORE OLESON, Jr., and MARJORIE DA COSTA EASTMAN, Appellants, v. WILLIAM D. SWACKHAMER, Secretary of State of the State of Nevada; and LEGISLATIVE COMMISSION OF THE STATE OF NEVADA, Intervener, Respondents.

No. 10650

September 19, 1978

Appeal from judgment; First Judicial District Court, Carson City; Michael E. Fondi, Judge.

Affirmed.

Gunderson, J., dissented.

Phyllis Halsey Atkins, Reno, for Appellants.

Robert List, Attorney General, and Donald Klasic, Deputy Attorney General, Carson City, for Respondent Secretary of State.

Frank W. Daykin, Carson City, for Respondent Legislative Commission.

OPINION

By the Court, Thompson, J.:

At issue is the constitutionality of chapter 174, 1977 Nev. Stats., which requires the submission of an advisory question to the registered voters of this state on the ratification of the proposed amendment to the Constitution of the United States commonly known as the equal rights amendment. It is asserted that the chapter violates article V of the federal constitution. The district court found no constitutional infirmity. For reasons hereafter expressed we agree with that court, and, therefore, affirm the judgment entered below.

The advisory question to be presented at the 1978 general election is set out in section 4 of the chapter. It is:

> "Do you recommend that the Nevada legislature ratify the following proposed amendment to the United States Constitution, commonly known as the equal rights amendment?
>
> "Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> "Sec. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> "Sec. 3. This amendment shall take effect two years after the date of ratification.
>
> "Yes..... NO....."

Section 3 and section 5 of the chapter

each expressly state that "the result of the voting on this question does not place any legal requirement on the legislature or any of its members." Section 6 directs the secretary of state to certify the result of the votes cast on the question to the president of the senate and the speaker of the assembly as the recommendation of the registered voters of the state. Thus, the legislature may vote for or against ratification, or refrain from voting on ratification at all, without regard to the advisory vote.

Article V of the federal constitution divests the people of authority to themselves ratify amendments to the federal constitution. Such power is limited to two methods, by action of the legislatures of three fourths of the states, or conventions in a like number of states. Hawke v. Smith, 253 U.S. 221 (1920) [1]

The appellants contend that chapter 174, in practical effect, grants the registered voters of Nevada the authority to ratify the proposed equal rights amendment to the federal constitution

---

[1] Article. V.: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and

since we may presume that the legislature will be governed by the outcome of the advisory vote if, perchance, it recommends ratification. However, the cases upon which they mainly rely in presenting this contention are not supportive. Those cases are Hawke v. Smith, supra, and Leser v. Garnett, 258 U.S. 130 (1922).

Hawke held that there could be no referendum upon the decision of a state legislature to ratify or reject a proposed amendment to the federal constitution. And Leser merely held that the function of a state legislature in ratifying a proposed amendment to the federal constitution was a federal function transcending any limitations sought to be imposed by the people of the state. [2]

Chapter 174 does not concern a binding referendum, nor does it impose a limitation

---

purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

upon the legislature. As already noted, the legislature may vote for or against ratification, or refrain from voting on ratification at all, without regard to the advisory vote. The recommendation of the voters is advisory only. In re Estate of Hogan, 146 N.W.2d 257 (Iowa 1966). To recommend does not mean to bind. Fletcher v. Porter, 21 Cal. Rptr. 452, 454 (Cal. D.C.A. 1962). Consequently we find it wholly impossible to construe chapter 174 as a limitation on legislative power violative of article V of the federal constitution.[3] Rather, the chapter simply specifies a means by which to assist the legislature whether to consent or not to consent to the proposed amendment. The following words of Dyer v. Blair,

---

2 Other cases dealing with a binding referendum on prior legislative action ratifying a proposed amendment to the federal constitution are Barlotti v. Lyons, 189 P. 282 (Cal. 1920); In re Opinion of the Justices, 107 A. 673 (Me. 1919); Decher v. Vaughan, 177 N.W. 388 (Mich. 1920); Hatch v. Murray, 526 P.2d 1369 (Mont. 1974). In each instance, the court found a violation of article V of the federal constitution.

Limitations upon legislative power to ratify or refuse to ratify a proposed federal amendment likewise are in violation of article V. Trombetta v. State of Florida, 353 F.Supp. 575 (M.D. Fla. 1973); State ex rel. Tate v. Sevier, 62 S.W.2d 895 (Mo. 1933); Walker v. Dunn, 498 S.W.2d 102 (Tenn. 1972).

390 F.Supp. 1291, 1307 (N.D. Ill. 1975), are apposite to the case at land:

> "Article V identifies the body--either a legislature or a convention--which must ratify a proposed amendment. The act of ratification is an expression of consent to the amendment by that body. By what means that body shall decide to consent or not to consent is a matter for that body to determine for itself. This conclusion is not inconsistent with the premises that the definition of the term "ratified" is a matter of federal law. The term merely requires that the decision to consent or not to consent to a proposed amendment be made by each legislature, or by each convention, in accordance with procedures which each such body shall prescribe."

Affirmed.

BATJER, C.J., and MOWBRAY and MANOUKIAN, JJ., concur.

GUNDERSON, J., dissenting:

I respectfully dissent.

I question whether the federal issue

---

3 One case, Opinion of the Justices, 160 N.W. 439 (Mass. 1928) may be read to support the proposition that a non-binding procedure is violative of article V. We reject that opinion as unsound and not supported by the authorities relied upon by the Massachusetts court.

could, in any event, be considered correctly decided. Moreover, so far as I can perceive, my colleagues have not explained how it is proper under the Nevada Constitution for our Legislature--through an "Act" obviously intended neither to make nor to modify law, and therefore manifestly outside the Legislature's normal lawmaking function--to utilize this state's election ballots in ways not contemplated by Nevada Constitution.

As the Legislative Counsel concedes, in Gibson v. Mason, 5 Nev. 283 (1869), this court declared the Legislature could not properly use the ballots to shift ultimate responsibility for enactment of a proposed law to the voters.[1] A fortiori, it would seem the Legislature, by Constitution solely a law-making body, may not pass a non-law requiring an "advisory" vote which binds neither the Legislature nor anyone else, and which defers to a future day decision on how the vote may be used to shift or dilute legislative responsibility.

In Opinion of the Justices Relative to Eighteenth Amendment, 160 N.E. 439 (Mass. 1928), the Supreme Judicial Court of Massachusetts treated a question identical in principle to the one before us, i.e. whether an attempt through initiative petition to order an advisory question onto the State election ballots was pro-

---

1 "An act of the legislature made dependent upon their votes or approval would be utterly void--and so it has been frequently held." Id. at 293.

per under the Massachusetts Constitution. Deciding such a directive was an improper exercise of law-making power, the Massachusetts court noted its view that "[t]he precise question is whether it is a 'law'..." Holding in the negative that respected court noted that "the word 'law' imports a general rule of conduct," 160 N.E. at 440, which of course the "Act" of our Legislature, now under consideration, most certainly does not involve. The Court went on to note that the supposed law was

> ...wanting in features essential to constitute its provisions a law within any permissible conception of the meaning of that word. Superficial appearances cannot clothe with the attributes of law something in substance vain and inoperative. The mandate to the secretary of the commonwealth in section 2 to tabulate the returns of the votes and to "transmit copies *** to each Senator and Representative in Congress from this commonwealth" is subsidiary and incidential to the main purpose of the proposed law; it relates to a matter which standing alone possesses no legal force; it cannot convert into a law something in itself ineffectual.

160 N.E. at 440.

Ms. Atkins, counsel for the E.R.A. proponents, in effect contends this "advisory" referendum is not only unconstitutional on its face, but inherently unfair to historically disadvantaged and therefore relatively underfinanced persons, such as

the proponents in this case arguably are. Ms. Atkins notes that rather than being able to concentrate their efforts merely on persuading the Nevada Legislature, as the U.S. Constitution would contemplate, E.R.A. proponents will now be forced to expend important financial resources attempting to win a totally non-binding victory in the November election--under penalty of having defeat used against them during the later, binding struggle in the Legislature.

Moreover, as Ms. Atkins points out, the E.R.A. proponents may well incur disadvantages from the "advisory" referendum--even if statewide vote totals show overall approval of the E.R.A. Election returns will be available district by district. Hence, arguably some key legislators might be persuaded by the advisory note to oppose the E.R.A., even if Ms. Atkins' clients succeed in generating general support for the amendment throughout Nevada.

Thus, Ms. Atkins argues in effect, by the improper use of the Nevada election process, the cost of the ratification process contemplated by the U.S. Constitution will be increased, its complexion will be changed, and uncontemplated complexities will be imposed. I agree.

Case No. 38593 Department No. 2

IN THE FIRST JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

ISABEL KIMBLE, et al., Plaintiffs,

vs.

WILLIAM D. SWACKHAMER, Secretary of State of the State of Nevada, Defendant.

LEGISLATIVE COMMISSION OF THE STATE OF NEVADA,
Intervener.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The parties to this action having filed cross motions for summary judgment, with the plaintiffs also filing a motion for preliminary injunction, and the parties having filed their points and authorities and an oral hearing being held thereon on January 30, 1978;

In consideration thereof, and for good cause appearing, this Court hereby makes the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. On November 8, 1977, the plaintiffs filed their complaint for declaratory

judgment and preliminary injunction for the purpose of challenging the constitutionality of Chapter 174, Statutes of Nevada 1977.

2. The parties agree that plaintiffs are taxpayers and tax monies will be expended to implement Chapter 174.

3. On December 29, 1977, the defendant and intervener filed a joint motion for summary judgment and on January 13, 1978, the plaintiffs filed motions for summary judgment and preliminary injunction.

4. There are no material facts in dispute, and only issues of law remain to be decided.

CONCLUSIONS OF LAW

1. The plaintiffs, as taxpayers, have the standing to bring this action. Both sides present a justiciable controversy through their adverse interests, and the matter is ripe for adjudication. Therefore, an action for declaratory judgment is proper.

2. Chapter 174 is a "law" within the provisions of Article 4 of the Nevada Constitution. It meets all of the prerequisites of a law with respect to its drafting and approval by the Legislature and its endorsement by the Governor. As a law, it requires and directs certain acts to be performed by the election officers of the state for the purpose of placing an advisory question upon the ballot and to transmit the result of the vote to the Legislature.

3. Chapter 174 is not an initiative or referendum measure and, therefore, does not violate Article 19 of the Nevada Constitution.

4. The nonbinding nature of the advisory question does not make Chapter 174 invalid. All legislation, not expressly prohibited by either the state or federal constitution, may be enacted by the Legislature. Chapter 174 is within the legislative authority vested in the Legislature by Article 4, Section 1 of the Nevada Constitution, since there is nothing in the Nevada Constitution which prohibits the Legislature from placing a non-binding, advisory question on the ballot.

5. Since the vote on the advisory question provided for in Chapter 174 is non-binding and not controlling on the Legislature, and since the Legislature, therefore, is not required to follow the results of the vote on the question of whether the Equal Rights Amendment should be ratified or not, Chapter 174 is not a part of the ratification process established in Article V of the United States Constitution and thus does not violate said Article V.

6. Plaintiffs are not entitled to either their motion for summary judgment or preliminary injunction.

7. Defendant and intervener are entitled to their motion for summary judgment.

ORDER

Therefore, in consideration of the

foregoing Findings of Fact and Conclusions of Law, it is hereby ordered, adjudged and decreed that:

1. Plaintiff's motions for summary judgment and preliminary injunction are denied; and

2. Defendant and intervener's motion for summary judgment is granted.

DATED this 31st day of January, 1978.

/s/ MICHAEL E. FONDI
Michael E. Fondi
District Judge

Supreme Court, U. S.
FILED
NOV 16 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-657

ISABEL KIMBLE, BRUCE BLACKDAR, MARY FRAZZINI, THEODORE OLESON, JR., MARJORIE DA COSTA EASTMAN,

Appellants,

v.

WILLIAM D. SWACKHAMER, Secretary of State of the State of Nevada,

and

LEGISLATIVE COMMISSION OF THE STATE OF NEVADA, Intervener,

Appellees.

On Appeal From The Supreme Court Of Nevada

MOTION OF APPELLEE LEGISLATIVE COMMISSION TO DISMISS OR AFFIRM

Frank W. Daykin
Legislative Counsel
Counsel for Appellee
Legislative Commission

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-657

ISABEL KIMBLE, BRUCE BLACKDAR, MARY FRAZZINI, THEODORE OLESON, JR., MARJORIE DA COSTA EASTMAN,

Appellants,

v.

WILLIAM D. SWACKHAMER, Secretary of State of the State of Nevada,

and

LEGISLATIVE COMMISSION OF THE STATE OF NEVADA, Intervener,

Appellees.

On Appeal From The Supreme Court Of Nevada

MOTION OF APPELLEE LEGISLATIVE COMMISSION TO DISMISS OR AFFIRM

Frank W. Daykin
Legislative Counsel
Counsel for Appellee
Legislative Commission

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-657

ISABEL KIMBLE, BRUCE BLACKDAR, MARY FRAZZINI, THEODORE OLESON, JR., MARJORIE DA COSTA EASTMAN,

Appellants,

v.

WILLIAM D. SWACKHAMER, Secretary of State of the State of Nevada,

and

LEGISLATIVE COMMISSION OF THE STATE OF NEVADA, Intervener,

Appellees.

On Appeal From The Supreme Court Of Nevada

MOTION OF APPELLEE LEGISLATIVE COMMISSION TO DISMISS OR AFFIRM

Frank W. Daykin
Legislative Counsel
Counsel for Appellee
Legislative Commission

Appellee legislative commission of the State of Nevada moves the Court (1) to dismiss the appeal taken in this action on the ground that the question presented has become moot or (2) in the alternative to dismiss the appeal or affirm the judgment of the Supreme Court of the State of Nevada on the ground that the question presented does not deserve further argument. This appellee adopts and endorses the presentation of these grounds by the attorney general on behalf of appellee William D. Swackhamer, with the single exception noted in the following paragraph.

In the proceedings of the 1977 session of the legislature upon the proposed "equal rights" amendment, the senate did not adopt the joint resolution for ratification, because under section 18 of article 4 of the Nevada constitution "a majority of all the members elected to each house shall be necessary to pass every bill or joint resolution," and the joint resolution in question received the affirmative votes of but 10 of the 20 senators. It is the official opinion of the legislative counsel (not disputed by the attorney general) that the lieutenant governor has no power to vote upon the passage of a bill or joint resolution. To dispose of this action, it is not necessary to decide whether the senate passed the joint resolution, for the

assembly did not, but the legislative commission could not let the recital pass unchallenged.

Dated this 14th day of November, 1978.

Respectfully submitted,

Frank W. Daykin
Legislative Counsel
Capitol Complex
Carson City, Nevada 89710
(702) 885-5627

Counsel for Appellee
Legislative Commission
of the State of Nevada

Certificate of Service

On November _____, 1978, pursuant to paragraph 1 of SCR 33, I mailed three copies of the foregoing motion to counsel of record for appellants and for appellee William D. Swackhamer.

_____
Frank W. Daykin
Legislative Counsel

Supreme Court, U. S.
FILED
DEC 1 1978
JOSEPH F. SPANIOL, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-657

ISABEL KIMBLE, BRUCE BLACKADAR, MARY FRAZZINI, THEODORE OLESON, JR., MARJORIE DA COSTA EASTMAN
Appellants,

v.

WILLIAM D. SWACKHAMER,
Secretary of State of the State of Nevada,

and

LEGISLATIVE COMMISSION OF THE STATE OF NEVADA,
Intervenor,
Appellees.

On Appeal From the Supreme Court of Nevada

REPLY TO APPELLEES' MOTION TO DISMISS OR AFFIRM

SOLAMAN G. LIPPMAN, ESQ.
THOMAS J. HART, ESQ.
LIPPMAN & HART
1801 K Street, N.W.
Suite 220
Washington, D.C. 20006
(202) 467-6520

Counsel for Appellants

Of Counsel:

PHYLLIS HALSEY ATKINS, ESQ.
777 West Second Street
Suite 200
Reno, Nevada 89503

December 1, 1978

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

Page

INTRODUCTION 1

ARGUMENT 2

A. The Continuing Taint of an Unconstitutional Referendum on the Ratification of the Equal Rights Amendment and its Pervasive Impact on the Amendatory Process in Nevada are sufficient to overcome Appellees claim of mootness 2

B. The Constitutional Injury for Which Appellants Seek Relief May Be Repeated and Nevertheless Escape Review 4

CONCLUSION 6

CITATIONS

CASES:

Carroll v. *President and Commissioners of Princess Ann*, 393 U.S. 175 (1968) 4
Dunn v. *Blumstein*, 405 U.S. 330 (1972) 5
Moore v. *Ogilvie*, 394 U.S. 814 (1969) 5
Nebraska Press Association v. *Stuart*, 427 J.S. 539 (1976) 4
Rosario v. *Rockefeller*, 410 U.S. 752 (1973) 5
Southern Pacific Terminal Co. v. *I.C.C.*, 219 U.S. 498 (1911) 5
Super Tire Engineering Co. v. *McCorkle*, 416 U.S. 115 (1974) 3, 4, 5
United States v. *Munsingwear, Inc.*, 340 U.S. 36 (1950) . 6

CONSTITUTIONAL PROVISIONS AND STATUTES:

Article V, United States Constitution 2, 4

Chapter 174, Nevada Statutes, 1977 ..... 2, 3

OTHER AUTHORITIES:

Note, The Mootness Doctrine in the Supreme Court, 88 HARV. L. REV. 373 (1974) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-657

ISABEL KIMBLE, BRUCE BLACKADAR, MARY FRAZZINI, THEODORE OLESON, JR., MARJORIE DA COSTA EASTMAN
Appellants,

v.

WILLIAM D. SWACKHAMER,
Secretary of State of the State of Nevada,

and

LEGISLATIVE COMMISSION OF THE STATE OF NEVADA,
Intervenor,
Appellees.

On Appeal From the Supreme Court of Nevada

REPLY TO APPELLEES' MOTION TO DISMISS OR AFFIRM

INTRODUCTION

On November 10, 1978, Appellee William D. Swackhamer, Secretary of State of the State of Nevada, responded to Appellants' Jurisdictional Statement by filing with the Court a Motion to Dismiss or Affirm. In that motion, Appellee urges, *inter alia,* that this matter has become moot because the advisory referendum scheduled for November 7, 1978, which referendum

Appellants sought to restrain by this action,[1] has been held and its results communicated to the public. This memorandum is in response to that argument.[2]

ARGUMENT

The Holding Of The November 7, 1978 Referendum Has Not Rendered This Appeal Moot

A. *The Continuing Taint of an Unconstitutional Referendum on the Ratification of the Equal Rights Amendment and its Pervasive Impact on the Amendatory Process in Nevada are sufficient to overcome Appellees claim of mootness.*

Although the November 7, 1978 referendum has been held and its result communicated to the public, the issue before this Court is not moot because the statute in question has not yet run its course. Section 6 of Chapter 174, Nev. Stat. 1977, requires that the Secretary of State certify the results of the November 7th referendum to the Legislature. Indeed, the results of the referendum are not legally cognizable by the Legislature until such certification occurs. Because Appellee cannot certify the results of the referendum until January 15, 1978 (the date on which the next session of the Nevada Legislature convenes) the requirements of

[1] Appellants also seek a declaratory judgment that the advisory referendum (which was mandated by Chapter 174, Nev. Stat. 1977) is violative of Article V of the Constitution of the United States. Appellants' application to this Court for an injunction restraining the conduct of the referendum pending appeal was denied by Mr. Justice Rehnquist on October 20, 1978 and by the Court as a whole on October 30, 1978.

[2] Appellees' contentions with respect to the merits of this appeal are adequately dealt with by Appellants' Jurisdictional Statement.

Chapter 174 have not been fulfilled and this matter is not moot.

The Equal Rights Amendment continues to remain a viable issue before the Nevada Legislature. The gravamen of Appellants' position is that the advisory referendum has unconstitutionally altered the amendatory process. Any action by the Legislature, or by individual members thereof, to ratify, refuse to ratify, or even to consider the Equal Rights Amendment following certification by the Secretary of State will be tainted by the unconstitutional referendum. The referendum cannot be treated as an isolated event without further ramifications because the taint of the referendum continues to permeate the ratification process and will continue to taint the process so long as the Equal Rights Amendment remains an unresolved issue before the Nevada Legislature without remedial Court action. For that reason, the issues raised by this appeal are not moot.

The continuing impact of the holding of the Nevada Supreme Court on the amendatory process, even beyond the Equal Rights Amendment, is at least as substantial and pervasive as that which this Court found sufficient to prevent the occurrence of mootness in *Super Tire Engineering Co.* v. *McCorkle,* 416 U.S. 115 (1974). The underlying issue in *McCorkle* was whether striking employees were entitled to receive welfare benefits. Since the strike giving rise to the dispute had terminated and benefits were no longer being received, it was urged that the matter was moot. This Court rejected the mootness claim and held that the availability of welfare benefits to striking workers had a continuous and pervasive impact on collective bargaining relationships in the state of New Jersey far beyond

the single terminated labor dispute. The continuing effect of the unconstitutional referendum on the amendatory process in Nevada is essentially parallel to the continuing impact on collective bargaining relationships in *McCorkle*. By virtue of the decision of the Nevada Supreme Court, an advisory referendum is now available not only with respect to the Equal Rights Amendment, but also in connection with any other proposed constitutional amendment. Thus, as in *McCorkle*, the issue of the constitutionality of the Nevada advisory referendum is not moot. *See also Carroll* v. *President and Commissioners of Princess Ann*, 393 U.S. 175 (1968); *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976).[3]

B. *The Constitutional Injury for Which Appellants Seek Relief May Be Repeated and Nevertheless Escape Review.*

The interpretation given to Article V by the Supreme Court of Nevada, holding that the advisory referendum is not repugnant to Article V, is now the definitive interpretation in Nevada. The Legislature could, at any time, direct additional advisory referenda (either at special elections or at regularly scheduled general elections). Yet, the substantial period of time required to litigate the issues through the state judicial system and to obtain full review by this Court[4] would make it highly unlikely that relief could be obtained

[3] For a full discussion of the mootness doctrine, *see* Note, The Mootness Doctrine in The Supreme Court, 88 HARV. L. REV. 373 (1974).

[4] It is not sufficient merely to bring the issue to this Court. If Appellees' contention with respect to mootness is correct, this Court must actually hear and decide the constitutional issue before the date of the referendum to prevent mootness from occurring.

before a challenged referendum was actually held. As this Court has stated, "... elections spaced at year-long or biennial intervals, should not preclude challenge to state policies that have had their impact and that continue in force, unabated and unreviewed". *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. at 126. The injury, the holding of an unconstitutional advisory referendum, could recur and yet never be susceptible to review by this Court, either in the context of Nevada's consideration of the Equal Rights Amendment or in the context of the Nevada Legislature's consideration of any other proposed amendment to the Constitution. The mootness doctrine cannot properly be invoked because the instant constitutional violation is of the sort which is "capable of repetition yet evading review". *Southern Pacific Terminal Co.* v. *I.C.C.*, 219 U.S. 498 (1911); *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115 (1974); *Dunn* v. *Blumstein*, 405 U.S. 330, 333, n.2 (1972); *Moore* v. *Ogilvie*, 394 U.S. 814 (1969); *Rosario* v. *Rockefeller*, 410 U.S. 752, 756, n.5 (1973).

CONCLUSION

For these reasons, the matter is not moot and this Court should note probable jurisdiction of this appeal. Should this Court determine that the matter is moot, Appellants request, in accordance with the Court's practice, that the judgment be vacated and the case remanded to the state court for appropriate disposition.[5]

Respectfully submitted,

SOLAMAN G. LIPPMAN, ESQ.
THOMAS J. HART, ESQ.
LIPPMAN & HART
1801 K Street, N.W.
Suite 220
Washington, D.C. 20006
(202) 467-6520

Counsel for Appellants

Of Counsel:

PHYLLIS HALSEY ATKINS, ESQ.
777 West Second Street
Suite 200
Reno, Nevada 89503

December 1, 1978

[5] *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).